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THE
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ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS. THE PRIVY COUNCIL
ALL DIVISIONS OF THE SUPREME COURT
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CORRIGENDA.

- P. 54. *Re BROWNIE, BROWNIE v. MUAUX.* Last line on p. 54 and l. A.3 on p. 57. The Editors are informed by counsel in the case that the plaintiff in fact had no descendants at the date of the will.
- P. 389. *CAXTON PUBLISHING CO., LTD. v. SUTHERLAND PUBLISHING CO., LTD.* Editorial Note, last sentence. It seems to be accepted that the period of limitation, upon the proper construction of the Copyright Act, 1911, s. 10, runs from the date of the act of infringement.
- P. 408. *GOKAL v. NAND RAM*, l. F.3, after "realise" insert "those debts and to the extent."
- P. 472. *JOHN v. MENDOZA.* Headnote. The last word of the first sentence should be "former."
- P. 545. *Re CLEADON. Bentleys, Stokes & Lowless* were agents for *Criddle, Ord & Muckle*, Newcastle-upon-Tyne.
- P. 653. *READ v. CROYDON CORPN.*, l. C.2, for "effects" read "affects."
- P. 690. *LOWRY v. CONSOLIDATED AFRICAN SELECTION TRUST, LTD.*, l. F.4. The commissioners decided in favour of the company.
- P. 731. *OWENS v. LIVERPOOL, CORPN.* *Donald, Darlington & Nice* acted as agents for *Neville, Mullen & Co.*

THE ALL ENGLAND LAW REPORTS ANNOTATED

THOMPSON (OTHERWISE HULTON) *v.* THOMPSON
(CAUSTON INTERVENING).

C [COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.,
October 13, 1938.)

D *Divorce—Suggested personation—Papers sent to King's Proctor—Intervention by King's Proctor—Costs of intervention where decree allowed to stand—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 178 (1), 181(1), 183(2)*

E During the hearing of an undefended divorce suit, it appeared that the woman intervener had supplied the petitioner's solicitors with medical certificates as to her virginity. She had refused the request of those solicitors that she should submit herself to examination by a doctor named by them. The matter was referred to the King's Proctor for inquiry. An intervention followed wherein it was alleged that the intervener had not committed adultery. At the hearing fresh evidence was called, but it was held that, though the certificates were, in fact, given in respect of the intervener, the evidence was sufficient to discharge the increased burden of proof upon the petitioner. The King's Proctor was ordered to pay three-quarters of the petitioner's taxed costs of the intervention:—

F HELD: this was not a case where the court required the case to be argued on behalf of the King's Proctor. Upon receipt of the papers, he might, or might not take action, at the discretion of the Attorney-General, but, upon the latter deciding to take action, the King's Proctor became a party, and liable to be ordered to pay the costs of his intervention if that were unsuccessful.

G *Decision of LANGTON, J. ([1938] 2 All E.R. 727) affirmed.*

H [EDITORIAL NOTE. The Court of Appeal have here shown distinction between the position where the law officers are requested by the court to argue a point of law and that where papers are sent to the King's Proctor, in the same way as they may be to the Director of Public Prosecutions, because they appear to disclose conduct upon the part of someone which should be the subject of full inquiry. The mere sending of papers to the King's Proctor does not necessitate his intervention, and any intervention subsequently made is made in the exercise of the discretion of the Attorney-General. In the case of such intervention, the King's Proctor proceeds subject to the usual risk of an order for costs being made against him. In *Sloggett v. Sloggett* (1) the court required the assistance of the King's Proctor on a question of fact. The correctness or otherwise of that decision, as the judgment herein states, does not arise in this case.

AS TO COSTS OF INTERVENTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 769, 770, para. 1215; and FOR CASES, see DIGEST, Vol. 27, pp. 485-487, Nos. 5160-5184.]

Cases referred to :

- (1) *Sloggett v. Sloggett*, [1928] P. 148; Digest Supp.; 97 L.J.P. 71; 139 L.T. 238.
- (2) *Higgins v. King's Proctor*, *King's Proctor v. Carter*, [1910] P. 151; 27 Digest A 487, 5178; sub nom. *Higgins v. Higgins*, *Carter v. Carter*, 79 L.J.P. 37; 102 L.T. 259.
- (3) *Jackson v. Jackson*, [1910] P. 230; 27 Digest 479, 5070; 79 L.J.P. 82; 103 L.T. 79.

APPEAL by the King's Proctor against an order of LANGTON, J., B reported [1938] 2 All E.R. 727, whereby he was directed to pay three-quarters of the petitioner's taxed costs, the costs in question being the costs incurred on the occasion of the action of the King's Proctor in showing cause why the decree *nisi* should not be made absolute.

The Solicitor-General (Sir Terence O'Connor, K.C.) and H. W. Barnard C for the appellant, the King's Proctor.

C. Doughty, K.C., and R. Bush James for the respondent, the petitioner.

The Solicitor-General : This appeal involves a matter of principle which requires an authoritative decision by this court. The King's Proctor intervened after decree *nisi* at the request of the judge, pleading D that material facts had not been disclosed. The court found that the action of the King's Proctor was abundantly justified. He failed to obtain a rescission of the decree *nisi*, but only because of new evidence introduced on the part of the petitioner. The decision of this court will enable the King's Proctor to see what course he should adopt in E the future. The Act of 1857 provided for one decree only. That was a cause of trouble in certain cases, and in 1860 an Act was passed by sect. 7 of which the decree was split into a decree *nisi* and a decree absolute. The law is now stated in the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 181, 183. The court has full discretion F as to costs, and I am not contending otherwise. Sect. 183 (2) authorises an intervention when material facts are not brought to the knowledge of the court. There is no precedent for this case, and the court will have little guidance from authority. The King's Proctor made investigations into this matter, and the court held that the intervention of the King's G Proctor was abundantly justified. Until the decision in *Higgins v. King's Proctor* (2) in 1910, it had been the invariable practice never to order the King's Proctor to pay costs. The Court of Appeal decided that the plain words of the section gave a discretion, and that no practice could prevail against the power given by Parliament. This is the first H case in which, after an invitation by the court, the King's Proctor has had to pay the costs of the petitioner. The judge did not exercise his discretion correctly in ordering the King's Proctor to pay three-quarters of the petitioner's costs. He did so upon the authority of *Higgins v. King's Proctor* (2), and on the ground that the prevailing practice to

the contrary was wrong. [Counsel also referred to *Jackson v. Jackson* (3) and *Sloggett v. Sloggett* (1).]

Counsel for the petitioner were not called upon.

A SIR WILFRID GREENE, M.R.: This is an appeal by the King's Proctor against an order whereby he was directed to pay three-quarters of the petitioner's taxed costs, the costs in question being the costs incurred on the occasion of the action of the King's Proctor in showing cause why the decree *nisi* should not be made absolute. The decree *nisi* was pronounced on July 9, 1937, on the petition of the wife. On B Jan. 14, 1938, the King's Proctor filed a plea showing cause why that decree *nisi* should not be made absolute, and he asked for the rescission of the decree, dismissal of the petition, and his costs. That plea failed, and the judge made the order with regard to costs which I have already mentioned.

C If the matter had stood there, no possible question could have arisen of disputing the correctness of the judge's exercise of his discretion as to costs. However, it is said on behalf of the King's Proctor that the D circumstances of this case were such that the court ought not to have ordered the King's Proctor to pay costs. It is said that the action of the King's Proctor in showing cause originated in a request made by the judge, and that that circumstance ought, as a matter of principle, to be sufficient to absolve the King's Proctor from the liability to pay costs, although it is not suggested that it would be sufficient ground for his asking for his costs of his unsuccessful action.

E The relevant facts bearing upon that argument can be stated very shortly. The petition was originally defended, and the woman named in the petition intervened. That defence and that intervention were withdrawn before the petition came on for hearing, but in the mean- F time the solicitors for the petitioner had had sent to them on behalf of the intervener two medical certificates certifying that the intervener was *virgo intacta*. This circumstance was with perfect propriety brought to the attention of the court by counsel for the petitioner. The evidence which was led on behalf of the petitioner was very strong. The judge found it convincing, and he pronounced the decree *nisi*. At the same G time, the existence of these certificates raised a doubt in the mind of everybody. The nature of that doubt at the time of the hearing appears to have been as to whether or not the intervener had engineered a fraud upon the doctors by getting some other woman to impersonate her. That was the sort of suggestion that was made. The judge at the H conclusion of the proceedings said this in relation to that suggested personation :

If there is a fraud here and a class of fraud has been perpetrated it is a class of fraud which requires very complete investigation.

He then gave the decree, and then he said :

I think I will impound the papers and ask the King's Proctor to make some inquiries and see if he can get any further.

The judge directed the papers to be sent to the King's Proctor, and the King's Proctor, having made certain investigations, apparently satisfied himself that the certificates in question did relate to the intervener, and that there had been no such personation as had been suggested. He thereupon, acting under the direction of the Attorney-General, filed his plea, wherein he alleged :

The decree *nisi* was obtained contrary to the justice of the case by reason of the following material facts not having been brought to the notice of this honourable court : That the respondent had not committed adultery with the intervener, that the intervener is and was at all material times a virgin and did not in fact commit the alleged adultery whereof inferential evidence was given at the hearing.

It was not, and could not be, suggested that the Attorney-General, when instructing the King's Proctor to put in that plea, was doing anything other than exercising the discretion which is placed in his hands. That plea was put in not as the result of some order of the court. The court had no jurisdiction whatsoever to order the King's Proctor to put in a plea showing cause, or to order the Attorney-General to instruct the King's Proctor to put in such a plea. The action of the Attorney-General and of the King's Proctor was an action taken on the discretion of the Attorney-General. When the matter came to be heard, evidence was called on behalf of the King's Proctor, and further evidence was called on behalf of the petitioner. There was some controversy as to whether the petitioner should be allowed to call such further evidence to prove adultery. That controversy was decided in favour of the petitioner by the judge, and after the whole of the evidence was called the judge, while thinking that there was no case of personation, nevertheless decided that the case was one where, in spite of the fact that the woman was a virgin, nevertheless adultery in law had been proved. The result of that, of course, was that the decree *nisi* stood, and the plea of the King's Proctor failed.

It is said that, as the King's Proctor had been set in motion by the judge himself, he should be relieved of the liability to pay costs which otherwise would *prima facie* have rested on him. The action of the King's Proctor, as I have said, was in one sense set in motion by the action of the judge in sending the papers to him with the request to investigate, but the phrase "set in motion" is one which is picturesque and metaphorical. What it does not mean in this case is that he was set in motion in the sense that the judge, acting within some jurisdiction, gave him an order to do what he did. That the judge did not do, and could not have done. That he was set in motion in the sense that facts were brought to his notice with a request to investigate, and that he did in consequence of that make an investigation, is perfectly true, but the decision to which he came after making that investigation—to take the action that he did—was his own decision, over which the court had not, and did not purport to exercise, any authority whatsoever.

That being so, it seems to me that that is an end of the case. It was suggested that the action of the court and of the King's Proctor

really fell under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 181 (1), which provides as follows :

A The court may, if it thinks fit, direct all necessary papers in the matter to be sent to His Majesty's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and His Majesty's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office.

B It seems to me quite impossible to hold that LANGTON, J., when he sent the papers to the King's Proctor with a request to investigate the facts, was acting under that subsection. He was not indicating any question to be argued. He was not purporting to require the assistance of the King's Proctor in arguing some point which had occurred in the case. What he was doing was what is commonly done by judges when, in a matter before them, something occurs which ought to be brought to the notice of those concerned with the administration, for example, of the criminal law. Of their own initiative they may impound papers and see that the information reaches the appropriate quarter. That, it seems to me, is exactly what the judge was doing in this case, and I am quite unable to take the view that he was exercising, or thought that he was exercising, any jurisdiction under the subsection which I D have quoted.

E Of course, I do not wish to throw the slightest doubt on any practice of the court that may exist under that subsection requesting the argument of some question by the King's Proctor, but in the present case the relevant section under which the action of the King's Proctor was taken is sect. 183 (2), which enables any person—which includes the King's Proctor—after decree *nisi* and before decree absolute, to

. . . show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court . . .

F There is, of course, no question of collusion here. That is the phrase under which the King's Proctor's action was taken—failure to bring material facts before the court. It was under that subsection that the King's Proctor acted, and the judge, as I have said, had no jurisdiction, and certainly never intended to assert jurisdiction, to call upon the G King's Proctor to take action which that subsection permits.

H The simple fact, of course, is that the King's Proctor, having had information brought to his attention by the judge, and having investigated the matter, under the instructions of the Attorney-General decided to take the course which the statute entitles him to take. He thereby made himself a party to the proceedings. He was asking for specific relief on the basis of certain allegations of fact. He failed to obtain the relief which he prayed. Although he established one of his allegations of fact—namely, that the woman was a virgin—he failed to establish what was the principal allegation of fact for the purpose of the relief that he was asking—namely, that adultery had not been committed.

That being so, it seems to me that the case assumes a very simple character, and in my opinion there is no ground whatsoever why this court should interfere with the discretion which the judge has exercised, which appears to me to have been exercised on a perfectly proper principle. The appeal must be dismissed with costs.

Before concluding, I will just say one word about the case which was referred to of *Sloggett v. Sloggett* (1), a decision of LORD MERRIVALE, P. All I need say about that case is that it was a case where the court, before decree *nisi*, invited, and in fact requested, the assistance of the King's Proctor, acting, as LORD MERRIVALE, P., held, under jurisdiction conferred upon it by what is now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (1), which imposes on the court the duty of satisfying itself as to the facts alleged, and so forth. In the course of discharging that duty, the court had desired to have the assistance of the King's Proctor, and required his attendance. I wish to throw no doubt whatever on that practice. It is not a matter with which we are concerned, because that was a totally different case, where, before the decree *nisi* had been pronounced at all, the court took that action. There is no such jurisdiction in the present case, and no such jurisdiction did the judge purport to exercise.

SCOTT, L.J. : I agree.

CLAUSON, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Treasury Solicitor* (for the appellant) ; *Withers & Co.* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

NOKES v. DONCASTER AMALGAMATED COLLIERIES, LTD. F

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 13, 1938.**]

Master and Servant—Written contract of personal service—Dissolution of employer company and transfer of property, rights and liabilities to another company—Whether contract of service between employee and transferee company—Companies Act, 1929 (c. 23), s. 154 (4). G

In Jan., 1937, the appellant entered into a written contract of service with a colliery company to serve the company as a coal-miner at their colliery. No notice to terminate the said contract was ever given to or by the appellant, and the appellant did not enter thereafter into any written contract of service with any other person or company. On June 4, 1937, an order was made under the Companies Act, 1929, s. 154, transferring to the respondent company the property, rights and liabilities of the colliery company, which was dissolved under sect. 153 of the Act. The order was duly published as directed by the court, but did not in fact come to the notice of the appellant. The appellant duly worked at the colliery until Oct. 7, 1937, and received his wages, which were paid weekly by the respondent company as from H

A June 4, 1937. On Oct. 7, 1937, the appellant absented himself without cause from his work at the colliery, and the respondent company sustained a loss of not less than 15s. in consequence thereof. The appellant was charged, under the Employers and Workmen Act, 1875, s. 4, with having wrongfully absented himself from, or neglected, the service of the respondent company, who claimed the sum of 15s. for damages for breach of contract. Between the date of the issue of the summons and the day of the hearing before the justices, the appellant continued to work for, and receive wages from, the respondent company. The justices found that there had been a breach of contract, and ordered the appellant to pay the damages claimed and costs. Thereupon this appeal was brought, and the appellant contended, *inter alia*, that no contract of service existed between him and the respondent company, and that the order of the court of June 4, 1937, could not and did not effect a transfer of a contract of personal service, which was by law incapable of assignment :—

B
C HELD : the definition of "property" in the Companies Act, 1929, s. 154 (4), whereby it "includes property, rights and powers of every description," was wide enough to include rights connected with, or arising out of, contractual rights as to service, and therefore a contract of service did exist between the appellant and the respondent company on Oct. 7, 1937, by virtue of the order of the court of June 4, 1937.

Per LORD HEWART, L.C.J. : for the purpose of this subject-matter, it is quite artificial to draw the distinction which is suggested between a contract for personal service and a contract of any other kind.

D [EDITORIAL NOTE. It is a general rule that contracts of general personal service contemplate that the person employed has been selected with reference to his individual skill, competency or other qualification, and it is therefore of the essence of the contract that the contracting party is entitled to personal performance, and, in default thereof, is entitled to treat the contract as at an end. By reason of this rule, it has been said that contracts of personal service are not assignable, but it is here held that it is possible for the assignment of contracts of general personal service to be included in a general assignment of all the property of a company about to be dissolved to a new company formed for the purpose of taking over the business of that company.

E AS TO ASSIGNABILITY OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 308-310, para. 431 ; and FOR CASES, see DIGEST, Vol. 12, pp. 592, 593, Nos. 4930-4933.]

F APPEAL by way of case stated against a decision of the justices for the county of York. The facts, the arguments, and the relevant sections of the Companies Act, 1929, are set out in the judgment of LORD HEWART, L.C.J.

G H. I. P. Hallett, K.C., and G. W. Wrangham for the appellant.

Sir Walter Monckton, K.C., and H. B. H. Hylton-Foster for the respondent company.

H LORD HEWART, L.C.J. : This is a case stated by justices for the county of York. The question arises in the following way. At a petty sessions in Doncaster on Nov. 19, 1937, a summons preferred by the present respondents against the appellant under the Employers and Workmen Act, 1875, s. 4, alleged that the appellant had wrongfully absented himself from, or neglected, the service of the respondents at their Hickleton colliery in the West Riding of Yorkshire on Oct. 7, 1937.

A small sum of damages was accordingly claimed. The justices, having heard the information and the evidence, ordered the appellant to pay to the respondent company a small sum of damages for breach of contract and a small sum of costs. The question—and the only question—for this court is whether, in so deciding, the justices came to a correct determination in point of law. In my opinion, they certainly did.

It is not necessary, I think, to re-read the case as a whole. It is found as a fact that in Jan., 1937, the appellant entered into a written contract of service with a company called the Hickleton Main Colliery Co., Ltd., whereby the appellant contracted to serve that company as a coal-miner in the Hickleton Main colliery, and no notice to terminate that contract was ever given to the appellant; nor, the case finds, did the appellant ever thereafter enter into any written contract of service with any other person or company. He worked at the Hickleton Main colliery until Oct. 7, 1937, and received wages week by week. On June 4, 1937, an order was made under the Companies Act, 1929, s. 154, transferring to the respondents—that is to say, to the Doncaster Amalgamated Collieries, Ltd.—the property, rights and liabilities of, among other companies, the Hickleton Main Colliery Co., Ltd., and dissolving the Hickleton Main Colliery Co., Ltd., under sect. 153 of the Act. The case finds that, although the order so made was duly published in accordance with the directions of the court, nevertheless it did not come to the notice of the appellant personally, and, to pass over less material findings, it appears that on Oct. 7, 1937, the appellant was absent without cause from his work at the Hickleton Main colliery, by reason of which absence the respondents sustained a loss of not less than 15s. Finally, the case finds that, between the date of the issue of the summons (that is to say, Oct. 16, 1937) and the date of the hearing before the justices (that is to say, Nov. 19, 1937), the appellant did continue to work for, and receive wages from, the respondents, and continued to do so afterwards.

In that state of affairs, it was contended on the part of the appellant (and it was his substantial contention) that no contract of service existed between him and the respondents, and that the order of the Chancery Division could not and did not effect the transfer of a contract of personal service, which was by law incapable of assignment. The respondents, on the other hand, contended—and contended with success—that the order of June 4, 1937, operated to transfer to the respondents the contract of service that the appellant had made with the Hickleton Main Colliery Co., Ltd. The respondents further contended that at the material time the appellant was obviously a servant of some employer—either the respondents, as provided for in the order, or, alternatively, the Hickleton Main Colliery Co., Ltd., a company then dissolved, whose property, rights and liabilities had passed to the respondents.

Those being the issues, the justices arrived at a conclusion which they have expressed in brief and clear terms. They find that the contract of service did exist, by virtue of the order of the Chancery Division of

June 4, 1937, between the appellant and the respondents. They find further that the appellant had received numerous weekly payments for service given by him under that contract from June 4, 1937, up to the date of the alleged breach, and, finally, that there had been a breach of contract on the appellant's part.

A The argument before us has covered no little ground, but it seems to me, with all due respect, that the point involved is capable of very lucid statement. It is provided by the Companies Act, 1929, s. 154 (1), that, where an application is made to the court under sect. 153

B . . . for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme . . . is to be transferred to another company . . . the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for . . .

C Then follows a list of various matters. In that list are mentioned, among other things :

D . . . (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company . . . (d) the dissolution, without winding up, of any transferor company . . . (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

By a later subsection, the same sect. 154 goes on to provide :

(4) In this section the expression " property " includes property, rights and powers of every description, and the expression " liabilities " includes duties.

E In view of those provisions of the Companies Act, 1929, there was an application by originating summons, dated Apr. 23, 1937, on the part of the Doncaster Amalgamated Collieries, Ltd.—that is to say, the respondents to the present appeal—and upon that application counsel for various persons and companies appeared, and, various documents having been read, it was ordered, among other things, that

F . . . all the property, rights and powers of [certain companies, including the Hickleton Main Colliery Co., Ltd.], and all other the property, rights and powers of the transferor companies be transferred without further act or deed to the transferee company . . .

It was also provided that the property, rights and powers should

G . . . vest in the transferee company for all the estate and interest of the transferor companies.

Further orders were also made. Those words contained in that order—

H " . . . all other the property, rights and powers of the transferor companies . . . "—are not *totidem verbis* identical with the words in the Companies Act, 1929, s. 154 (4). There, as I have said, the words are :

. . . " property " includes property, rights and powers of every description. . . .

It is perfectly obvious, however, that no real variation was either contemplated or expressed. The order is as if the very words of the statute, and no others, had been copied into it.

In those circumstances, it was contended in the court below—and it has been contended here, if I may say so, with most admirable clearness by Sir Walter Monckton—that what was done was automatically and immediately to give statutory force to what would otherwise have been a novation. What, one asks, is the purpose of this section? It does not need the help of the marginal note to perceive that we are dealing with provisions for facilitating—not for hindering, not for frustrating, not for bewildering, but for facilitating—the reconstruction and amalgamation of companies, and the question really turns upon the degree of scope or meaning to be given to the crucial words, “property, rights and powers of every description.”

It is argued on the part of the appellant in this court that those words are not aptly devised to include contracts of personal service, and, therefore, as his contract existed, not, as he says, with the respondents, but only with the Hickleton Main Colliery Co., Ltd., nothing that was done on the application that was made to the court could have the effect of making him serve two masters, or of making him serve a new master in substitution for the old one.

I have listened, not without interest, to the argument which has been made, and the inferences which are suggested from a survey of such other statutes as the Railways Act, 1921, the London Passenger Transport Act, 1933, and the Local Government Act, 1929. However, it seems to me that it is not merely of some importance, but of great importance, to observe with what it is that those various Acts are dealing. Where they are dealing specifically with the position of officers and servants whose rights are being altered in one way or another, it is quite natural that one should find in schedules or elsewhere specific and clear provisions with regard to the position of the named individual. It seems to me that wholly different considerations apply where one is dealing with an Act of Parliament the purpose of which is to enable without undue delay, and, so to say, at a stroke, the transfer of property, rights and powers of every description, and liabilities, including duties, from one limited company, or a series of limited companies, to another, from the transferor company or transferor companies to a transferee company. For that purpose, it seems to me that the words which are employed in sect. 154 (4) of that statute of 1929 are wide enough to include in the term “rights and powers” rights connected with, or arising out of, contractual rights as to service. In one sense, it is no doubt true to say that such a contractual right is personal. It is personal because it has to do with persons, and it is a right to personal service. When looked at from another point of view, however, a right of that kind, and a body of rights of that kind, may be regarded as of the nature of property. There passes from the transferor company or transferor companies to the transferee company a body of rights, including rights connected with, and arising out of, the employment of men in a mine.

It seems to me, with all due respect to the argument which has been

put before us, that, for the purpose of this subject-matter, it is quite artificial to draw the distinction which is suggested between a contract for personal service and a contract of any other kind. The substratum of the argument for the appellant in this court, as in the court below, was that no contract of service existed between him and the respondents.

A The answer—and, it seems to me, the effective answer—which is made by the respondents is that a contract of service did at the material time exist. It existed between the appellant and the respondents by virtue of the order of the Chancery Division made in June, 1937, in pursuance of the statute of 1929.

B Some other matters have been mentioned or referred to. I hope that I shall be guilty of no disrespect to anybody if I refrain from pursuing them further. It seems to me that the justices, with good grounds, arrived at a clear conclusion, and I think that this appeal ought to be dismissed.

C

CHARLES, J. : I do not feel justified in this case in adding more than a few words, adopting, as I do, the whole of that which has already been said by LORD HEWART, L.C.J., in his judgment.

The point really—when all side issues are set aside, as they should be —becomes one of extreme shortness. This miner, the appellant, says there was no contract between him and the respondent company. If that is rightly contended, the magistrates were wrong. It is contended, however, by the respondents that a contract of service between them and the workman did exist, and for this reason. It is agreed on both sides
E that the fourth point in the respondents' case as set out in the special case is correct—namely :

that sect. 154 of the Companies Act, 1929, was an enabling section directed to enable amalgamations and dissolutions of companies by a simpler procedure than under the prior law.

F The question then arises whether or not sect. 154 does enable a written contract of service to be transferred as a right or a power without the consent of both parties—that is to say, without novation. Does sect. 154 give statutory force to such an operation ? It appears to me that, when sect. 154 is read, and when the scope of that section is realised, there is
G no doubt that the magistrates were correct in finding that that section did in fact, by the order made under that section by the High Court on June 4, 1937, transfer that contract of service from the Hickleton company to the Doncaster company, the Hickleton company being the old company to which LORD HEWART, L.C.J., has already referred, and
H to which I do not propose to refer in detail. The section is a section clearly designed to facilitate reconstruction and amalgamation of companies. In this particular type of amalgamation of mines, it is essential to see that among these great undertakings there is a continuity of business, that the business is carried on. That section enables it to be carried on, because it lays down that the transfer to the transferee com-

pany shall be "of the whole or any part of the undertaking or of the property or liabilities of the transferor company." So narrowed down, it comes to this: is a written contract of service made by a workman with the transferor company (that is, the Hickleton company) transferred by the order made under sect. 154? I think that it is only necessary to look at the Companies Act, 1929, s. 154 (4), to see what was intended. That subsection states:

... the expression "property" includes property, rights and powers of every description. . . .

The purpose of the section being, as I have said, to facilitate amalgamations and transfers, to me it is quite inconceivable that the contract of service does not pass with the other property and rights under this section. If it passes, the contract of service was in existence between the appellant and the respondents at the time when he performed that act or failed to perform those acts which resulted in his being fined. For myself, I have no doubt whatever that the justices were quite correct in the decision at which they arrived.

MACNAGHTEN, J.: I am of the same opinion, and have nothing to add.

Appeal dismissed with costs. Leave to appeal.

Solicitors: *Hosking & Berkeley*, agents for *J. W. Fenoughty, Dunn & Co.*, Rotherham (for the appellant); *Bird & Bird*, agents for *Gichard & Co.*, Rotherham (for the respondent company).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

SHARPE v. TOPHAMS, LTD.

[CHANCERY COURT OF LANCASTER (Sir John Bennett, V.-C.), July 26, 1938.]

Companies—Shares—Share certificate—Right of shareholder to certificates for altered subdivision of his shares.

The trustees of a will held 230 shares in a company, and from time to time they had requested that the share certificates should be altered to different amounts, each amount represented by a separate certificate. This request had been complied with on four occasions, but on the fifth occasion the directors of the company objected, and refused to alter the subdivision. It was provided by the articles that every member should be entitled to one certificate for all the shares registered in his name, or to several certificates, each for a part of such shares:—

HELD: although the directors in the exercise of their discretion might comply with such a demand, the trustees had no right to demand certificates for different amounts, and were not entitled to an order compelling the directors to issue such certificates.

[EDITORIAL NOTE.] The terms of the articles in the present case do not precisely follow those of Table A, but are not so different therefrom that the decision may not be useful in considering the duty of directors under Table A. Generally, a shareholder is entitled to the issue of one certificate free of charge, and, upon payment

of a small fee and the execution of an indemnity, that certificate may be replaced if it is defaced, lost or destroyed. No doubt it is convenient to persons in the position of trustees to have the division of the shares held by them altered from time to time as the beneficial interests in such shares change. Doubtless the directors of a company would within reason raise no objection to the issue of new certificates, but here the contention was that the shareholders were entitled as of right, subject
A only to a proper payment, to the issue of certificates for altered amounts. It is decided that there is no such right in the shareholder, although there is nothing to prevent the directors, in the exercise of their discretion, from complying with such a request.

AS TO SHARE CERTIFICATES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 262, 263, paras. 455-458; and FOR CASES, see DIGEST, Vol. 9, p. 287, Nos. 1780-
B 1782.]

Case referred to :

(1) *Hyman v. Elandslaagete Collieries, Ltd.* (1921), 42 N.L.R. 43; 9 Digest 287, case *p*.

C ACTION claiming the issue of share certificates representing an altered subdivision of the shares held by the plaintiffs. The facts are fully set out in the judgment.

W. P. Spens, K.C., and *J. J. Somerville* for the plaintiffs relied upon *Hyman v. Elandslaagete Collieries, Ltd.* (1).

D *A. Grant, K.C.*, and *W. L. Blease* for the defendants.

SIR JOHN BENNETT, V.-C. : This case arises upon the construction of the articles of a company known as Tophams, Ltd. The company has a capital of £100,000 divided into 1,000 shares of £100 each. The
E plaintiffs in this action are the trustees of the will of a deceased shareholder holding 230 of these shares, and they have from time to time requested that their share certificates should be altered to different amounts. In the pleadings, it is stated that on four occasions they have had their shareholding split up into different amounts, each
F represented by separate certificates. The total amount remained the same, but the number of certificates and the number of shares on each certificate were varied on four occasions. They are now asking for them to be varied on a fifth occasion, and the directors of the company have objected.

G I have heard a great deal of argument about what the result might be in the event of one or other side being right, but I do not think that I am concerned with that side of the question. If the shareholders have the right, the fact that the directors think the exercise of that right may be detrimental to the company is, in my view, not a reason for my
H refusing to allow the right to be exercised. The question I have to decide depends on certain articles. The articles of the company exclude Table A. The articles with regard to certificates are the articles which have to be construed in this connection. Art. 11 provides as follows :

The certificates of title to shares shall be issued under the seal of the company and signed in such manner as the directors shall prescribe.

Then Art. 12, which is the article upon which the matter turns, provides as follows :

Every member shall be entitled to one certificate for all the shares registered in his name or to several certificates each for a part of such shares. Every certificate of shares shall specify the numbers of the shares in respect of which it is issued and the amount paid up thereon. A

Art. 13 provides as follows :

If any certificate be worn out or defaced then upon production thereof to the directors they may order the same to be cancelled and may issue a new certificate in lieu thereof and if any certificate be lost or destroyed then upon proof thereof to the satisfaction of the directors or in default of proof on such indemnity as the directors deem adequate being given a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate. B

Art. 14 provides as follows :

Every member shall be entitled to one certificate gratis but for every subsequent certificate issued to him the sum of 1s. or such smaller sum as the directors may determine shall be paid to the company. C

Then there is a provision with regard to joint shareholders, and then there are certain provisions as to pre-emption of shares. Art. 21 provides for shares being offered to the directors in the first instance. That, of course, is a serious matter for shareholders in this company, but it is one of the articles of the company, and it is one of the regulations upon which they hold their shares, and, whether they like it or not, they must abide by it. Then other provisions are made with regard to transfer. There is one other relevant provision—namely, art. 33, which provides as follows :

Every instrument of transfer shall be delivered to the company for registration accompanied by the certificate of the shares to be transferred and such other evidence as the directors may require to prove the title of the transferor to his right to transfer the shares. D

I do not think that there are any other articles which have much bearing on the present question, but there are two sections of the Companies Act which have some bearing on it—namely, sects. 67 and 68. Sect. 67 provides that, after allotment, the certificates must be ready within a certain time for delivery. Sect. 68 provides as follows :

A certificate, under the common seal of the company, specifying any shares held by any member, shall be *prima facie* evidence of the title of the member to the shares. E

A certificate is issued to a shareholder with a view to giving him evidence of his title to the shares, and, if one considers the history of share certificates, the Companies Act, 1862, first provided that certificates might be issued, and, I gather from what has been said by counsel before me, even before 1908 most companies provided in their articles for the issue of certificates. At any rate, it became a very common practice before 1908, when sect. 67 of the present Act first appeared in the Companies Act, 1908. Since then, it has been almost universal practice to have provisions as to share certificates in the articles in much the same form as that in which these articles are framed. I have F

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had no evidence on the point, but I should not have thought that these articles were exceptional articles, or that this art. 12 was an exceptional article, in that it provides for one certificate or several certificates, and it is remarkable that there is no authority, as far as I know, on the point which has arisen. I cannot regard the case from the Natal
A Law Reports as an authority, because the articles were different, and I do not know what the Companies Acts in Natal may provide. They may be different from the Companies Act with which I am dealing. The first thing that strikes me is that the Companies Act provides that a certificate as evidence of title must be ready for the members. Then
B the article provides as follows :

Every member shall be entitled to one certificate for all the shares registered in his name or to several certificates each for a part of such shares.

That is, every member is given an alternative. He can say, "I want one certificate for all my shares," or "I want them divided up in the
C way I specify." He is given a choice between two alternatives, but, once he has exercised his choice of one alternative, there is no indication in these articles that he can change his mind and say, "I did certainly say that I would have one certificate under art. 12, but I have changed my mind, and now I will have several instead of one." There is nothing
D to suggest that he has a subsequent chance of exercising his choice between those two alternatives, and, looking at the matter from a business point of view, one would hardly expect that a company should have to provide evidence of title, and then new evidence of title, having already provided it once, to satisfy, it might be, every whim of share-
E holders. Of course, in this company the shares are £100, but, if they were £1 shares, it might be extraordinarily inconvenient to be always being asked for divisions, and, as a business proposition, one would hardly expect that that would be what was intended. To my mind these articles do not express any intention of that sort, and I think
F that that view is confirmed by the other provisions in the articles, such as art. 13, which makes special provision as follows :

If any certificate be worn out or defaced then upon production thereof to the directors they may order the same to be cancelled and may issue a new certificate in lieu thereof and if any certificate be lost or destroyed then upon proof thereof to the satisfaction of the directors or in default of proof on such indemnity as the
G directors deem adequate being given a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate.

Again, where there is a transfer of shares, before a new certificate is issued, before the transfer is allowed by the directors, the articles require the old certificates of the shares to be sent in to the company. They
H secure that the old certificates of the shares shall not remain outstanding. Arts. 13 and 33 make the position perfectly plain, and protect the company and the directors in respect of certificates already issued. One would have expected that, if a member could change his certificates from time to time, and if that was what was intended by art. 12, a provision would have been made with regard to old certificates—namely,

that the directors would in that case have been given a right to have the old certificates handed back to them. There is no such provision in these articles, and, to my mind, that is an indication that it was not contemplated that, after one or several evidences of title in the way of certificates had been issued to members, they, having exercised the choice which was given to them, should be able to change their document or documents of title at their pleasure for others of a different sort. A

I have come to the conclusion that, having once exercised the option which is given them by art. 12, shareholders have no right to demand of the directors that they should be given new documents of title, as claimed by the plaintiffs. If the directors choose to comply with such request, I do not think that there is anything to prevent them from doing it, but I hold that they are not compelled to do it. B

Action dismissed with costs.

Solicitors: *Evans, Lockett & Co.* (for the plaintiffs); *Radcliffe-Smith, Abercromby & Co.* (for the defendants). C

[Reported by M. D. CHORLTON, Barrister-at-Law.]

HAWKES v. TORQUAY CORPORATION. D

[EXETER SUMMER ASSIZES (Branson, J.), July 1, 1938.]

Public Authorities—Limitation of actions—Acts within statutory protection—Entertainment pavilion erected and carried on by local authority—Plaintiff injured by falling poster-frame—Remoteness of damage—Public Authorities Protection Act, 1893 (c. 61), s. 1. E

By virtue of the powers contained in the Torquay Harbour Order, 1910, as confirmed by the Pier and Harbour Order Confirmation Act (No. 2), 1910, the defendant corporation had erected and were carrying on an entertainment pavilion. While the plaintiff was attempting to buy a ticket at the booking-office of this pavilion, a poster-frame fell on her and injured her. In an action for damages for personal injuries, the defendants contended that, as they were a public authority, the action should have been commenced within the period of six months prescribed by the Public Authorities Protection Act, 1893, s. 1. F

The plaintiff's daughter, who before the accident had had a whole-time job, which enabled her to pay the plaintiff 17s. 6d. per week towards her keep, had to give up her work for a time in order to look after her mother, who thereby lost this weekly contribution. It was contended that this source of damage was too remote:— G

HELD: (i) the Pier and Harbour Order Confirmation Act (No. 2), 1910, merely enabled the corporation to build this pavilion, and did not compel them either to build it, or, having built it, to carry it on. Their conduct in so doing was entirely voluntary, and they were, therefore, not protected by the Public Authorities Protection Act.

(ii) the loss of the daughter's contribution to the home was a source of damage that was properly included, and for which the plaintiff was entitled to recover. H

[EDITORIAL NOTE. The words of the Public Authorities Protection Act are very wide, and it has often been decided that their scope must be restricted in some way. It is not sufficient that a public authority should be acting under an Act. The authority must be compelled by the Act to do the particular act out of which

the complaint arises, or it must be an act amounting to a duty owed to the public at large. In the present case, although the authority required the permission of an Act of Parliament to enable them to build the pavilion at the public expense, the work of carrying it on only entailed a duty to such of the public as used the pavilion, and that duty is not sufficiently wide in its scope to bring it within the provisions of the Act as they have been restricted by previous decisions.

A AS TO PROTECTED ACTS, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 293-297, paras. 611-616; and FOR CASES, see DIGEST, Vol. 38, pp. 106-112, Nos. 761-795.]

Cases referred to :

- (1) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; *affg.*, [1915] 1 K.B. 417.
- (2) *Palmer v. Grand Junction Ry. Co.* (1839), 4 M. & W. 749; 38 Digest 110, 789; 8 L.J.Ex. 129.
- (3) *Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 38 Digest 102, 733; 74 L.J.K.B. 484; 92 L.T. 568.

C ACTION for damages for personal injuries received by the plaintiff from a falling display-frame at Torquay Pavilion entertainment hall, where the plaintiff was attempting to buy a ticket at the booking-office. The hall was erected by the defendants and carried on by them as an entertainment hall under the powers contained in the Torquay Harbour Order, 1910, confirmed by the Pier and Harbour Order Confirmation Act (No. 2), 1910. Sect. 4 of that Act gives power to the corporation to lease certain land to other persons for the purpose of erecting thereon a hall or place of entertainment and gardens in connection therewith. Sect. 5 provides that the corporation may themselves, with the approval of the Local Government Board, erect and maintain and furnish and equip upon the site referred to in sect. 4 a pavilion, concert hall or place of entertainment, and may charge for admission thereto. Alternatively, the corporation may decide to let or lease the pavilion, if and when so erected by them, to other persons on such conditions as they may think fit. The corporation in fact erected the pavilion and kept it in their own hands, having appointed a general manager for the corporation and an acting manager. The building is used as an ordinary place of entertainment for the public, who are admitted thereto upon payment for admission, just as if the pavilion were owned by a private individual, or as if it were leased by the corporation to somebody else to run it and to make private profit from it.

J. D. Casswell, K.C., and N. R. Fox-Andrews for the plaintiff.

H. D. Samuels, K.C., and F. S. Laskey for the defendants.

H BRANSON, J. : This action raises two points : (i) whether the action itself is brought within the proper length of time, which depends on whether or not it comes within the language of the Public Authorities Protection Act, 1893, and (ii) whether or not the action is entitled to succeed if it is brought within the proper time, which depends upon whether or not the plaintiff has established that the defendants by their

servant were guilty of negligence which has caused her damage. The point arising under the Public Authorities Protection Act, 1893, is the first to decide.

The accident happened to the plaintiff while she was attempting to buy a ticket at the booking-office of the Pavilion, erected and run by the defendants as a place of entertainment. They were empowered so to do by the Torquay Harbour Order, 1910, confirmed by the Pier and Harbour Order Confirmation Act (No. 2), 1910. The authority of the corporation was to erect, if they chose, a pavilion upon a designated area of ground, when, if they chose, they could use it themselves, charging for admission. Alternatively, if they preferred to do so, they could lease the building which they had erected to somebody else, to use and to admit people to it for such payment as might be thought fit. In fact, having erected the pavilion, the corporation ran it themselves, appointing a general manager and an acting manager on their behalf. If the corporation ran it, the order provides that any profit obtained is to be applied in the same manner as that in which the rates received by the corporation are to be applied. On behalf of the plaintiff, it is contended that, the action not having been brought within the six months, in respect of this adventure the defendants are not a public authority entitled to the protection of the Public Authorities Protection Act, 1893. On behalf of the defendants, it is contended that they are a public authority entitled to the protection of the Act, and thus there arises again the troublesome question whether or not, in the circumstances of this case, the defendants are so entitled.

In my opinion, of the cases that have been cited to me, the one that is nearest to the present case is *Bradford Corpn. v. Myers* (1). In that case, the House of Lords, after considering that question, came to the conclusion that the Act did not apply, and some of the reasons which were given by their Lordships seems to me to apply very particularly to the facts of this present case. LORD BUCKMASTER, L.C., in the course of delivering the leading opinion, read out the relevant section of the Public Authorities Protection Act, at p. 245 :

Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect. . . .

On behalf of the defendants, it is contended that they are within the statute because they had the authority to build this pavilion and to carry it on, and that therefore what they have done was done in the execution of that authority. It has been pointed out repeatedly that the words of the statute are very wide, and that it is impossible to give them their full meaning without any restriction at all. In order to show what the restriction is, LORD BUCKMASTER, L.C., said, at p. 247 :

While the preamble is necessary thus to constrict the meaning of the persons

whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform.

A Of course, a local authority gets all its powers from the statute, and, if it was sufficient to say that the local authority was doing this because it was authorised by the statute to do it, then every act the local authority might do would be within the Public Authorities Protection Act. As LORD BUCKMASTER, L.C., points out, that obviously is not the intention of the Act. He says, at p. 247 :

B In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public.

C Then later on LORD BUCKMASTER, L.C., deals with *Palmer v. Grand Junction Ry. Co.* (2), and he points out that there the railway company had power to carry horses, but was under no obligation to carry them. Having said that, he quotes with approval the language of PARKE, B., in dealing with the case, where he said, at p. 766 :

D The Act does not compel them to be common carriers ; it only enables them to be so, so far as they shall think fit ; and when they have elected to become so, they are liable in that character, in the same way that other common carriers are.

E I am urged to say that *Lyles v. Southend-on-Sea Corpn.* (3) shows that *Bradford Corpn. v. Myers* (1) can be differentiated from the case before me, but I notice that in *Bradford Corpn. v. Myers* (1), at p. 249, LORD BUCKMASTER, L.C., refers to *Lyles v. Southend-on-Sea Corpn.* (3) as another instance of the cases where the proceedings out of which the action arose were in the course of the direct execution of an Act of Parliament or discharge of a public duty by a local authority.

F That brings one back to see what the position was in *Lyles v. Southend-on-Sea Corpn.* (3). What happened there was that the corporation applied for powers under the Light Railways Act, 1896, to enable them to erect a light railway. They were not bound to erect it, but it was held—and this really seems to me to be the *ratio decidendi* of that case—that, once they had elected to build a railway and to operate it, then by sect. 48 they were compelled to carry it on as the carriers. Thus, once G they had elected to build the railway, they were not volunteers, but in operating it they were operating it in the direct execution of an Act of Parliament.

H Here there is nothing in this Act which compels the corporation to build this pavilion. There is nothing in the Act which compels them, after they have built it, to carry it on. Whether they carry it on themselves, or whether they lease it to somebody else, or whether they shut it up altogether, is a matter entirely for their own choice, and it seems to me that it is quite impossible to extend the language of the Public Authorities Protection Act, as interpreted by the cases and *Bradford Corpn. v. Myers* (1), to cover such a voluntary course of conduct. In

my opinion, therefore, the defence based upon the Public Authorities Protection Act fails, and I will deal with the case as though the corporation were a private company, or, in other words, as though the action had been brought within the six months.

In the present case the special damages have been agreed, but then comes a claim which is disputed. It arises in the following way. It is said that before the accident Miss Annie Hawkes, the plaintiff's daughter, used to go out to a whole-time job, which enabled her to make a contribution of 17s. 6d. per week towards her keep. It is also said that, when the accident happened, the daughter first gave up her work for a week in order to look after her mother, and then went back to her work from Oct. 12 to Nov. 30, while a neighbour looked after the house. Then, as the mother did not get better, the daughter had to give up her work, and consequently the mother lost the contribution which the daughter used to make. It seems to me that, upon the evidence, it is established that—for a time, at all events—it was necessary for the daughter so to give up her work, so that she was no longer able to pay the 17s. 6d. to her mother. In Mar., 1938, the daughter went back to full work, but for the period over which she has not been doing her work there has been a loss to the mother of £101 10s. It is very difficult to come to the conclusion that the daughter would voluntarily have given up going to her work, thus losing not only 17s. 6d., but also the rest of the 30s. per week which she used to earn, if she had not thought that it was necessary for her to do so in order to look after her mother. Consequently, I think that that sum of £101 10s. ought to be added to the special damages, which were agreed at £63 19s. 9d.

Then we come to the question of general damage. Here Mrs. Hawkes is not actually out of pocket. What she has lost is the ability to get about and enjoy herself in the same way as she used to do. I do not think that it is established that this accident has done anything in the way of aggravating the varicose veins from which she has suffered, and I think that in all probability the tenderness in the foot which has been troubling her will disappear. Consequently, I think that, if I add the £100 to the £165 9s. 9d. special damage, that ought to meet the case.

Judgment for the plaintiff for £265 9s. 9d., and costs.

Solicitors: *Hooper & Wollen* (for the plaintiff); *Almy & Thomas* (for the defendants).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

WEST RIDING CLEANING CO., LTD. v. JOWETT.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 14, 1938.**]

Street Traffic—Offences—Standing on window-sills—Servant of window-cleaning company standing on window-sill not in sunk or basement storey—Whether such servant an “occupier or other person”—Ejusdem generis rule—Town Police Clauses Act, 1847 (c. 89), s. 28.

The appellants, whose business was that of window-cleaning, on a certain date by their servant were cleaning a window of a room as independent contractors under contract with the occupier of the room. The servant stood upon the sill of the window in order to clean the outside of the window. The sill was of rough stone, about 1 ft. wide and about 18 ft. immediately above a public street along which passengers frequently passed and re-passed. No particular passenger had been endangered by the servant so standing, and the appellants had supplied him with a safety-belt. The appellants were charged with having unlawfully and to the danger of passengers permitted a person in their service to stand on the sill of the window in order to clean the outside thereof, such window not being in the sunk or basement storey, contrary to the Town Police Clauses Act, 1847, s. 28. The appellants contended, *inter alia*, that there was no danger to passengers within the meaning of the Act, and that the *ejusdem generis* rule should be applied to interpret the words “or other person” in sect. 28, so as to restrict their application to persons closely akin to occupiers, and thus to exclude the appellants. The stipendiary magistrate convicted the appellants and fined them the sum of 10s. Thereupon this appeal was brought:—

HELD: the danger to passengers was sufficient to constitute danger within the meaning of the Act, and, as the appellants had not discharged their duty to take all reasonable steps to ensure that their servants cleaned windows in the course of their service in a lawful manner, the offence charged was proved.

[EDITORIAL NOTE. While the decision in this case seems perfectly clear from the terms of the Town Police Clauses Act, 1847, the circumstances are of every-day occurrence in any town of any size, and it is not thought that the matter has in general been made the subject of a prosecution. As a result of this decision, companies carrying on this class of business will be well-advised to see that their employees either use proper safety apparatus or otherwise contrive to keep the operation outside the terms of the section.

AS TO STREET OFFENCES, see HALSBURY, 1st Edn., Vol. 27, pp. 281-285, para. 591; and FOR CASES, see DIGEST, Vol. 42, pp. 846 849, Nos. 34-50.]

APPEAL by way of case stated from a decision of the stipendiary magistrate in and for the city of Bradford, sitting at Bradford.

S. Seuffert for the appellants.

H. M. Pratt for the respondent.

LORD HEWART, L.C.J.: This is a case stated by the stipendiary magistrate for the city of Bradford. The information was preferred on Feb. 19, 1938, by a police inspector, the present respondent, under the Town Police Clauses Act, 1847, s. 28, against the present appellants for that on a day in Feb., 1938, in Bradford they unlawfully and to the danger of passengers in a certain street did permit a person in their

service to stand on the sill of a certain window in a house in order to clean the outside of that window, the window not being in the sunk or basement story, contrary to the provisions of the section. The stipendiary magistrate, having heard the information, convicted the appellants and imposed a fine. The question raised by this case is whether he came to a correct determination in point of law.

The facts are as simple as can be. The appellants are described as a company who specialise in cleaning windows as independent contractors under contracts with occupiers of premises. On the day named, the appellants by their servant were cleaning a window of a room in a house under contract with the occupier of the room. The servant stood upon the sill of the window in order to clean the outside of the window, and the case finds that the sill was about 1 ft. wide and about 18 ft. immediately above Leeds Road, a public street along which passengers frequently pass and re-pass. The case adds that there was no evidence that any particular passenger had been endangered by the said servant so standing. The appellants, moreover, it is found, supplied their servant with a safety-belt, to which was attached a short chain at the end of which was affixed a hook and a metal triangle, by which a workman could attach himself where a ring or other appropriate fixture was affixed near the windows, or where the window consisted of an upper and lower half opening and shutting vertically. There was no such ring or fixture affixed in this case, however, and the windows referred to opened outwards in the manner of a casement, or of French windows. Finally, it is found that the servant of the appellants was a trained and experienced window-cleaner, wearing rubber-soled shoes.

It was contended, upon that evidence, on the part of the appellants, that there was no danger to passengers within the meaning of the Act ; that the relevant portion of the Act did not apply, because there was no commercially practicable method of cleaning the outside of the window (an interesting and slightly amusing contention, as the Act would then be repealed *pro tanto* if no other commercially practicable method is to be found) ; and (this appears to have been a serious contention) that the relevant portion of the Act did not apply to the appellants, because the appellants were not occupiers, and the context indicated that the *ejusdem generis* rule should be employed in this case so as to restrict the words " other person " to persons closely akin to an occupier.

The contrary was contended on behalf of the respondent, and the stipendiary came to the conclusion : (i) that the danger to passengers, though not grave, was sufficient and sufficiently proved to constitute danger within the meaning of the Act, (ii) that the court was not concerned with commercial practicability, and (iii) that it was within the power, and was the duty, of the appellants to take all reasonable steps to ensure that their servants cleaned windows in the course of their service in a lawful manner, and that the appellants had not done so, and that they knew, or ought to have known, the nature of the window and room,

and that by employing their servant to clean the window they caused or permitted him to stand on the window-sill. In my opinion, the conclusion of the stipendiary was manifestly right, for the reasons which he has so carefully set out.

A The relevant part of the Town Police Clauses Act, 1847, s. 28, is in these words :

Every occupier of any house or other building, or other person, who orders or permits any person in his service to stand on the sill of any window, in order to clean, paint . . . the outside of such window, or upon any house or other building within the said limits, unless such window be in the sunk or basement storey [is guilty of an offence].

B The words which govern that particular sentence in the section, which is a long section, are :

Every person . . . shall be liable to a penalty not exceeding 40s. for each offence [or an alternative] who within [the] view [of the constable] commits any such offence; . . .

C Then follows a long list of offences. If that which is complained of is done within the view of "any constable or other officer appointed by virtue of this or the special Act," the consequences follow. It is really impossible, except for the purpose of controversy, to misinterpret the words of this section. Clearly a distinction was drawn between the occupier of the house or building, on the one hand, and a person who was not such an occupier, on the other hand. Both are liable ; on the one hand, "every occupier of any house or other building who orders or permits," and, on the other hand, every "other person who orders or permits" is liable. What is it that gives rise to the liability ? If a person, whether occupier or not, "orders or permits any person in his service to stand on the sill of any window in order to clean . . . upon the outside of such window," then the offence is committed. I will not, by repeating it, diminish the effect of what was said by the stipendiary. He seems to have been manifestly right, and I think that this appeal therefore fails.

G CHARLES, J. : I agree. The matter seems to me to be too plain for words, and, indeed, if an argument had not been addressed to us, I should have said that it was incapable of being argued.

MACNAGHTEN, J. : I agree.

Appeal dismissed with costs.

H Solicitors : *Jaques & Co.*, agents for *H. B. Sullivan*, Bradford (for the appellants) ; *Torr & Co.*, agents for *N. L. Fleming*, Town Clerk, Bradford (for the respondent).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

HINDS AND DIPLOCK v. BRECONSHIRE COUNTY COUNCIL.

[GLAMORGANSHIRE SUMMER ASSIZES (Singleton, J.), July 19, 1938.]

Highways—Roadside waste—Fences and boundaries—Presumption of dedication—Rebuttable—Public user.

The plaintiffs were owner and occupier respectively of a farm which the plaintiff Hinds had bought in Dec., 1918. They claimed that an unenclosed piece of land bordering the highway abutting on their land was part of the farm, and in 1936 they proceeded to fence it. Thereupon the defendants by their servants or agents removed the fence, claiming the land to be roadside waste and part of the highway in relation to which the defendants were the highway authority. The fence erected in 1936 was in a continuous line with fences on adjoining parts of the highway, but there was an old fence at a distance from the highway varying from 37 ft. to 99 ft. Evidence was given that animals had in the past strayed upon the land from the highway and that gypsies had encamped there. The defendants contended that, in the case of a highway running between fences, there is a presumption that the public right of way extends over the whole space of ground between the fences, and is not confined to the metalled portion, and that *prima facie* the fences are to be taken as having been originally put up for the purpose of separating land dedicated to the public as highway from land not so dedicated:

HELD: (i) such a presumption would not be raised unless the circumstances were such as to make it reasonable to do so.

(ii) the circumstances in this case were such as did not raise such a presumption.

[EDITORIAL NOTE. Where there is a metalled track, the first presumption is that the highway is confined to such track. If there are fences on both sides of the highway, then the *prima facie* presumption is that the whole space between the fences forms the highway. This presumption may be rebutted by the fact that the fences do not form a continuous line following the line of the highway. In that event, very slight acts of ownership on the part of the adjoining owner will serve to displace the above presumption.

AS TO WIDTH OF HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 258-262, paras. 313-319; and FOR CASES, see DIGEST, Vol. 26, pp. 312-316, Nos. 442-480.]

Cases referred to:

- (1) *Harvey v. Truro Rural Council*, [1903] 2 Ch. 638; 26 Digest 313, 454; 72 L.J.Ch. 705; 89 L.T. 90.
- (2) *Offin v. Rochford Rural Council*, [1906] 1 Ch. 342; 26 Digest 313, 455; 75 L.J.Ch. 348; 94 L.T. 669.
- (3) *Neeld v. Hendon Urban District Council* (1899), 81 L.T. 405; 26 Digest 314, 461.
- (4) *R. v. United Kingdom Electric Telegraph Co., Ltd.* (1862), 2 B. & S. 647 n.; 26 Digest 313, 452; 31 L.J.M.C. 166; 6 L.T. 378.
- (5) *R. v. Wright* (1832), 3 B. & Ad. 681; 26 Digest 283, 186; 1 L.J.M.C. 74.
- (6) *A.-G. and Croydon Rural District Council v. Moorsom-Roberts* (1908), 72 J.P. 123; 26 Digest 315, 468.
- (7) *Belmore (Countess) v. Kent County Council*, [1901] 1 Ch. 873; 26 Digest 314, 466; 70 L.J.Ch. 501; 84 L.T. 523.

ACTION for a declaration that a piece of land belonged to the plaintiffs' farm and was not roadside waste dedicated as part of the highway, and

for an injunction, damages and costs. The facts are fully set out in the judgment.

Ralph Sutton, K.C., and C. Verley Price for the plaintiffs.

Trevor Hunter, K.C., and T. Jenkin Jones for the defendants.

A SINGLETON, J. : The plaintiffs in this case, Mr. David Hinds and Mr. Labon Diplock, are owner and occupier respectively of the farm called Llwyngollen in the parish of Ystradfellte in the county of Brecon. The dispute between the plaintiffs and the defendant county council is in relation to a piece of land adjoining, and to the south-east of, the highway
B leading from Pontneathvaughan to Ystradfellte, which the plaintiffs claim is part of the farm and which the defendants say is roadside waste, and, as such, forms part of the highway. The farm is marked on the ordnance sheet by a red line around it, and the piece of land in dispute is thereon hatched red. The land in question is less than half-an-acre
C in area, and is worth something under £20. It is to be regretted that considerable costs have been incurred in regard to such a small matter, particularly having regard to the offer of the owner of the land contained in the letter of Dec. 1, 1936. In that letter, which is addressed to the surveyor to the defendant county council, Mr. Hinds wrote :

D Dear Sir, I beg to acknowledge receipt of your letter of the 28th ultimo. You are entirely wrong in your statement ; the public have not had the right of user over the land for many years. If you personally saw the land referred to you would not make the statement contained in your letter. You should see it first. I shall certainly not remove the fence neither will you before it takes the right course. I have not yet had counsel's opinion on your letters to ascertain whether I can apply to the High Court for an injunction to prevent you from removing the fence. If I am able I shall instruct counsel to do so at once.
E

One or two sentences in the letter are not quite clear. Now comes the paragraph to which I wish to refer :

F If you require the land to widen the road or for any other improvement I shall be most pleased to give it to you, but it is land I bought and paid for and conveyed to me. Therefore I warn you to go fully into the matter before you give any instructions to damage and trespass on my land.

Mr. Hinds had given the county council land in other parts for road-widening, and I am satisfied that he was willing to act reasonably in this case and to meet any legitimate requirement of the county council.
G The defendants were not prepared to accept this offer, and, so far as the correspondence shows, there was no reply to the letter of Dec. 1. The piece of land in dispute is shown on the plan on the conveyance of Mar. 17, 1875, by which this farm and other lands were conveyed to one Richard Edwards. Richard Edwards' trustees sold the farm by public
H auction in 1918, and it was purchased by the plaintiff Hinds. The area of the farm is shown by the printed conditions of sale as being 22 acres, 3 rods, 22 perches, and the rent is shown as £14. In the schedule appears the following :

No. on Plan, 1161, rough pasture area, 1 rood, 36 perches.

This is the land in dispute. The land is shown as part of the farm on

the plan with the advertised particulars of sale, which plan is stated to be based on the ordnance survey map. The conveyance to Mr. Hinds is dated Dec. 16, 1918, and the plan on the conveyance shows the land adjoining the highway as part of the farm. There is thus no question as to the plaintiff's title to the land. I should add that on the ordnance sheet and on the plan with the particulars of sale, and on that with the conveyance to Mr. Hinds, there is shown a footpath running through the farm and the piece of land in dispute. Its course is indicated right up to the highway. There is no hedge or fence between the piece of land and the highway. There is, however, a small bank along most of it. This bank is about 2 ft. high. Gullies have been cut into it in several places to allow water to run off the road. No doubt it has been added to from time to time by scrapings from the road being thrown on to it, but I do not think that this bank is wholly made up of such scrapings. The bank itself is a little distance back from the metalled portion of the road, probably 2 ft. or 3 ft., and two telegraph poles have been erected on or near it. The land slopes down rather sharply from the road towards the farmhouse and buildings. It is rough in character, consisting largely of brushwood, brambles and ferns. It is about 140 yds. in length, and varies in depth from the road from 37 ft. to 99 ft. It is numbered 1161 on the 1918 ordnance sheet. Between it and the immediately adjoining field of Mr. Hinds, No. 1164, there is an old hedge or fence. No. 1164 is on a lower level than is No. 1161, and the division between them is largely made by a natural bank or ridge about 2 ft. 6 ins. in height. On the top of this there is the old fence. Mr. Trevor Hunter, on behalf of the county council, submitted to me that everything up to this old fence must be regarded as roadside waste, and as forming part of the highway. The defence as pleaded raised many other points. Particulars were ordered on two occasions, but those given were not very helpful. The only question argued before me was whether or not this land was roadside waste. The road itself is an unclassified road. It is a waterbound macadam road, varying in width from 14 ft. to 16 ft. It has been sprayed comparatively recently, but there is little traffic on it, even to-day. To the north of the land there is a common on which animals were regularly left to graze, and from time to time animals strayed down the road and grazed on the land in question. Evidence of this, and of gypsies occasionally being on the land in past years, was called on behalf of the defendants, with the object of showing that the user of the land was consistent only with its being part of the highway. I am not sure that any great help was given by this evidence. Since Mr. Hinds became the owner of this land, he has undoubtedly done what he could to assert his ownership of the land. Previous owners have done little or nothing, probably because the land was of no value. About 1936, Mr. Hinds, or his tenant, erected a post-and-wire fence on the bank, about 2 ft. or 3 ft. from the metalled portion of the highway. This fence is shown on the defendants' photograph in evidence. In 1937, the defendants

removed this fence, which had cost about £6 to erect, and this action followed. The writ was issued on July 31, 1937, and by it the plaintiffs claim :

A (a) A declaration that the piece of land adjoining the public highway leading from Pontneathvaughan to Ystradfellte having an area of 1 rood and 36 perches or thereabouts and numbered 1161 on the ordnance survey sheet of Breconshire (18th Edn.) forms part of Llwyn-y-collen (otherwise Llwyngollen) Farm in the parish of Ystradfellte in the county of Brecon and is the property of the plaintiffs free from any right of the public to use it as a highway. (b) An injunction to restrain the defendants their servants and agents from trespass. (c) Damages for wrongfully entering the said land and pulling down the plaintiffs' fence. (d) Costs.

B Statement of claim followed in due course, and by it as amended the plaintiffs claim :

C (a) A declaration that the said piece of land is not roadside waste or land over which the public have any right of user, but is part of the said farm and subject only to the public right of way (if any) over and along the pathway shown by dotted lines on the 1918 edition of the ordnance survey map for Brecknockshire (Sheet XLIV, 15) in continuation of the public right of way (if any) shown by dotted lines on the said map over the said farm (b) £5 damages (c) An injunction. . . .

D It is unnecessary to refer to the defence in detail, as Mr. Trevor Hunter assured me that he relied on the one point, and on nothing else. His argument was founded on the presumption which arises in the case of an ordinary highway running between fences—namely, that all the space between the fences is dedicated as highway unless the nature of the ground rebuts, or other circumstances rebut, that presumption. He cited *Harvey v. Truro Rural Council* (1) and *Offin v. Rochford Rural Council* (2). In the former case, JOYCE, J., said, at pp. 642, 643 :

E In the first place, as the admitted plan shows, the old fences on either side of the road are as regular and continuous as one ever sees them, though the distance between them is not perfectly uniform. Indeed this is seldom, if ever, found to be the case, except where the land has been first enclosed in recent years; or the road has been set out of uniform width by the award of commissioners, or otherwise, under some Inclosure Act or other statute. The extreme width between the ancient fences, which include between them both the hard road and the strip, appears to vary from 30 ft. to 43 ft. at the most—by no means an extraordinary width for a public highway. There is evidence to show that the hard road at one time ran much nearer to the fence on the eastern side than it does now. It is also the fact that not long before 1870 the metalled portion of the road was widened at the expense of the strip as then existing without any objection from the then owner of Trenowth. Prior to the year 1885 no part of the strip was inclosed, nor was the use thereof by the public obstructed in any manner. In my judgment the ancient and present fence bounding the inclosed lands on the eastern side of the road was put up or constructed in reference to the highway, and not as a boundary between the inclosed land and any piece of uninclosed waste, and the strip generally appears to have been actually used in the same manner and to as great an extent as roadside wastes belonging to the highway, but not metalled or kept in repair, are commonly used. In the case of an ordinary highway running between fences, although it may be of a varying and unequal width, the right of passage or way *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers.

H He then proceeded to refer to *Neeld v. Hendon Urban District Council* (3), in which case VAUGHAN-WILLIAMS, L.J., said, at p. 410 :

The presumption is that *prima facie*, if there is nothing to the contrary, the public right of way extends over the whole space of ground between the fences

on either side of the road; that is to say, that the fences may *prima facie* be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated.

A little later, in *Harvey v. Truro Rural Council* (1), JOYCE, J., added, at p. 645 :

As I understand it, all that the defendants have done is to cause to be broken down a portion of the new fence or wall in process of erection by the plaintiff. This, I think, they were entitled to do if such fence was an illegal encroachment, as I hold it to be, there being, in my opinion, in the present case no sufficient evidence to rebut the presumption that the whole of the land between the fences of the road where the plaintiff proposed to inclose forms part of the highway, and there being nothing in the dimensions, shape, or character of the ground to make the presumption inapplicable. If necessary I hold, as a matter of fact, that the fences of the road here were put up for the purpose of separating land dedicated as a highway from land not so dedicated.

In the headnote to *Offin's case* (2), at p. 342, it is stated to be held that :

. . . in the absence of anything to show the contrary, it must be assumed from the nature and position of the fence surrounding the land that it had been put up as a boundary of the highway; that the presumption therefore arose that the land formed part of the highway; and, on the evidence, that there was nothing to rebut that presumption.

It is often said that no two cases are precisely alike in their facts, but *Offin's case* (2) does appear to me to be nearer on its facts to the present case than is *Harvey's case* (1), to which I have just referred, but it must always be clear that in a matter of this sort the facts of one particular case cannot form a complete guide to the decision in another case. In other words, each case must depend upon its own facts. In *Offin's case* (2), WARRINGTON, J., as he then was, having dealt with *R. v. United Kingdom Electric Telegraph Co., Ltd.* (4), and *R. v. Wright* (5), said, at p. 352, citing the judgment of CHANNELL, J., in *Neeld v. Hendon Urban District Council* (3), at p. 407 :

"Of course it is a question of degree in each case whether or not there is a substantial piece of waste, and then comes the question whether the fences between the inclosed land and the waste were put up with any reference to the highway or whether they were put where they are for some other reason. I am inclined to think that in each case that question ought to be decided before any question of presumption with regard to the space which in fact may be found to exist between the fences."

Later WARRINGTON, J., at p. 352, continued the citation from p. 407 :

"Of course the inclosing from the waste may have been with reference to the highway in the way that I have mentioned. It is perfectly possible. When a highway runs through a large piece of waste, and portions of the waste are inclosed with the consent of the lord of the manor, it may be that the very reason why so much is inclosed and not more is the existence of the highway and the doctrine I have referred to. Consequently, it seems to me that, before considering the question of presumption, you must first consider whether the fences in existence were put up in reference to the highway, and are fences or boundaries of the high road in the sense in which CROMPTON, J., used the expression in *R. v. United Kingdom Electric Telegraph Co., Ltd.* (4), or whether they are simply boundaries separating the inclosed land from the waste."

Later in *Offin's case* (2), WARRINGTON, J., says, at pp. 352, 353 :

In the Court of Appeal there are certain expressions in the judgment of LORD RUSSELL, C.J., which were much relied upon by the plaintiff. He said, at p. 409 : "Their suggestion"—that is, of the defendants, the urban district council—"is that because the road has hedges on either side, the whole space between those hedges

is part of the highway, and in support of that argument they relied upon the case of *R. v. United Kingdom Electric Telegraph Co., Ltd.* (4). I confess that I think there is a great deal to be said in support of the remarks of CHANNELL, J., upon that case and the other cases cited to him. It seems to me very difficult to give assent to such a general proposition as this, that under all conditions where you find a metalled road bordered by unmetalled margins and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway. The question whether such a space is all highway would depend to a great extent, I think, on many other circumstances, such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway. It seems to me that it is not safe to say, as a general proposition, without knowing the conditions of each particular case, that in such a case as I have mentioned all the space between the hedges is part of the highway."

That is a citation from the judgment of LORD RUSSELL, C.J., in *Neeld's* case (3). WARRINGTON, J., continues, at pp. 353, 354 of *Offin's* case (2) :

He [LORD RUSSELL, C.J.] then goes on to say it is not necessary to pursue that subject further, because he comes to the conclusion (agreeing with CHANNELL, J.) that there was ample evidence to rebut the presumption, even if it existed ; and, therefore, there is no decision on that point.

A. L. SMITH, L.J., cites the proposition as stated by CROMPTON, J., which I have already read, and accepts that as a correct statement of the law, making no further remark upon it, but only going on to state that he thinks the presumption is rebutted. VAUGHAN WILLIAMS, L.J., says this [in *Neeld's* case (3), at p. 410] : " I entirely agree that if any presumption could be made from any of the facts as to this piece of land forming part of the highway, it is amply rebutted by the evidence before the court. But I wish to add one word with regard to the applicability of the presumption to a case where a road goes across the uninclosed waste of a manor. The presumption is "—and now he states the presumption—" that *prima facie*, if there is nothing to the contrary, the public right of way extends over the whole space of ground between the fences on either side of the road ; that is to say, that the fences may *prima facie* be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated. But in the case of the waste of a manor there is another obvious reason for which fences may be put up, namely, to separate the adjoining closes from the waste. I therefore doubt if any presumption can be said to arise in the case of a road going across the uninclosed waste of a manor." I have not to deal with waste of a manor, and, therefore, that part of the judgment of VAUGHAN WILLIAMS, L.J., does not assist me. But I think that the alternative way in which he states the presumption where it does exist is of great assistance. I mean this—that the fences which are found on either side of a highway " may *prima facie* be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated."

It seems to me that the result both of that case and of *R. v. United Kingdom Electric Telegraph Co., Ltd.* (4) is this—that the mere existence of fences on either side of a highway is not enough to raise the presumption. You have to find whether those fences are *prima facie* to be taken to have been made in reference to the highway, and, therefore, to be the boundaries of the highway, and, further, I think that, having regard to the judgment of VAUGHAN WILLIAMS, L.J., if you find a fence by the side of the highway, then *prima facie* that fence is the boundary of the highway, unless you can find some reason for supposing that it was put up for a different purpose.

Mr. Ralph Sutton, in reply, referred me to a number of authorities, some of which are cited in the judgments to which I have referred. The most useful of these is *Neeld v. Hendon Urban District Council* (3), in which case the decision of CHANNELL, J., was affirmed in the Court of Appeal, and in which LORD RUSSELL, C.J., gave the first judgment, part of which was cited in the report which I have just read. I propose to read a little more of it. LORD RUSSELL, C.J., said, at p. 409 :

But how do the defendants try to make out the fact of dedication of the *locus*

in quo as part of the highway? Their case is simply one of presumption. Their suggestion is that because the road has hedges on either side, the whole space between those hedges is part of the highway; and in support of that argument they relied upon the case of *R. v. United Kingdom Electric Telegraph Co., Ltd.* (4). I confess that I think there is a great deal to be said in support of the remarks of CHANNELL, J., upon that case and the other cases cited to him. It seems to me very difficult to give assent to such a general proposition as this, that, under all conditions where you find a metalled road bordered by unmetalled margins and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway. The question whether such a space is all highway would depend to a great extent, I think, on many other circumstances—such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway. It seems to me that it is not safe to say, as a general proposition, without knowing the conditions of each particular case, that in such a case as I have mentioned all the space between the hedges is part of the highway. But it is not necessary to pursue this subject further, because the question which was principally debated here was whether the presumption, assuming it existed, was rebutted by the evidence offered at the trial. Now, there are great difficulties in the way of forming any precise rule of general application. It is often impossible to discover the exact circumstances under which a fence has been erected upon any particular spot. The fence may have been put there because there was already a sort of natural boundary, or it may be in some cases that the person who made the inclosure wished to leave a margin of ground for the use of the public if at any time the road should become foundrous. But even in the latter case I doubt whether it would be right to say that a margin left by the landowner outside a fence for that purpose is necessarily thereby dedicated by him as a highway for all time.

Mr. Ralph Sutton also referred to *A.-G. and Croydon Rural District Council v. Moorsom-Roberts* (6), a decision of EVE, J., in which it was held, at p. 123, that, in the circumstances of that case:

... the fence was not put up in reference to the highway, but was an original boundary of a close of land through which the highway had been made, and that the presumption that the lateral fence of a highway is its boundary was therefore rebutted; and that the acts of user proved did not amount to a dedication to the public, and that the plaintiffs' claim failed.

Mr. Ralph Sutton also referred me to *Belmore (Countess) v. Kent County Council* (7), a decision of COZENS-HARDY, J. The headnote reads as follows:

Where there are uninclosed spaces by the sides of a metalled highway there is no invariable presumption that the highway extends to the fence on either side. The nature of the district, the width and level of the margins, and the regularity of the lines of fence are circumstances to be taken into account in determining the fact of dedication.

It is unnecessary to refer to further authorities. For the purpose of this case, I am content to take a passage in the judgment of WARRINGTON, J., in *Offin's case* (2), where there is a concise summary of the law, at p. 354:

It seems to me that the result both of that case [*Neeld's case* (3)] and of *R. v. United Kingdom Electric Telegraph Co., Ltd.* (4) is this—that the mere existence of fences on either side of a highway is not enough to raise the presumption. You have to find whether those fences are *prima facie* to be taken to have been made in reference to the highway, and, therefore, to be the boundaries of the highway, and, further, I think that, having regard to the judgment of VAUGHAN WILLIAMS, L.J., if you find a fence by the side of the highway, then *prima facie* that fence is the boundary of the highway, unless you can find some reason for supposing that it was put up for a different purpose.

Dealing with the piece of land in dispute, I consider these facts to be of

importance. There is no continuous hedge, but at each end of the piece of land there is a continuous and regular hedge, close, or fairly close, to the metalled portion of the road. The bank along the piece of land is practically in a continuous line with those hedges. It seems to me probable that the hedges in these parts were made long after there was
A a road—that is to say, long after the road was built—and that much more was at one time open and uninclosed. At some time the occupier of the farm decided to put up a fence to keep his stock, or some of it, from wandering. The most economical way to do this was to put a small fence on the ridge which is between the fields numbered 1161 and 1164
B on the 1918 ordnance sheet. Mr. Morris, a surveyor of experience, was called, and he referred to the fences in other fields, one of which is a continuation of this fence, built, as the fences are, along the natural ridges or banks. I was impressed by this consideration, and I think that it was this which led to the fence being placed where it was and is,
C and I do not think that it was made in reference to the highway at all. To put it in another way, it appears to me that the occupier of the farm at some time in the past desired to enclose or fence a greater area. He put up a fence of kinds in the most convenient and most inexpensive place, but that fence bore no relation to the highway, and no one had
D any thought or intention of dedicating to the highway the portion between it and the highway. Mr. Ralph Sutton submitted that, if that was the case, no presumption such as was claimed by the defendants could arise. As WARRINGTON, J., said, in *Offin's case* (2), at p. 354 :

E You have to find whether those fences are *prima facie* to be taken to have been made in reference to the highway. . . .

Also, as LORD RUSSELL, C.J., said, in *Neeld v. Hendon Urban District Council* (3), at p. 409 :

F The fence may have been put there because there was already a sort of natural boundary. . . .

Applying these considerations to the present case, I am unable to hold that, in the circumstances, the presumption claimed by Mr. Trevor Hunter applies so as to compel me to hold that the land in question, which is in fact No. 1161 on the 1918 ordnance sheet, forms part of
G the highway. On the facts of the case, I cannot draw any such conclusion or make any such presumption. This strikes me as being common sense in the present case, having regard to the nature of the district, the width of the margins generally, the hedges, the levels of the land, and the shape and size of the piece of land in question. The county surveyor, who was
H called on behalf of the defendants, had not himself a great knowledge of the particular road and land. The divisional surveyor was not called, but other witnesses, four in number, called by the defendants, gave evidence as to user of the land. I do not see how the matters to which they speak can be held to amount to a dedication to the public. It cannot be said that, because an owner or occupier does not persistently turn

everyone and everything off his land, which adjoins the highway, there-upon the land becomes dedicated to the public as part of the highway. I ought to add that the fence which was put up by the plaintiffs in 1936 did not interfere with the right of way along the footpath, which is shown on the ordnance sheet as continuing right through the land in question up to the metalled portion of the road. It is, perhaps, a small point, but, if the land were part of the highway, there would be no need for the making of a footpath through or over it. A

In my judgment, the plaintiffs are entitled to the declaration for which they ask, and I think that they are entitled to recover the sum which they claim as damages—namely, £5 for the replacement of the fence which was removed. B

Solicitors: *Evan J. Hinds*, Swansea (for the plaintiffs); *Gee & Edwards*, Swansea, agents for *Albert Jolly*, Brecon (for the defendants).

[Reported by *ITHEL DAVIES*, Esq., Barrister-at-Law.] C

R. v. MINISTER OF HEALTH, *Ex parte* COMMITTEE OF VISITORS OF GLAMORGAN COUNTY MENTAL HOSPITAL.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **October 13, 14, 1938.**] D

Crown Practice—Certiorari—Dispute to be determined by Minister of Health—Decision to be final—Whether subject to certiorari—Asylums Officers' Superannuation Act, 1909 (c. 48), ss. 2, 10, 11, 15.

W. commenced his employment as a shoemaker in a county mental hospital in 1915 during the War. His employment was at first considered temporary, but, in fact, it was continued until 1934. He was never considered by the committee as a permanent employee, and they at all times refused to accept from him subscriptions in respect of the superannuation allowance. After the termination of his employment, his application for a superannuation allowance was refused by the committee, but granted by the Minister on appeal. The Asylums Officers' Superannuation Act, 1909, s. 15, provides that the decision of the Minister shall be final. The difference between the view taken by the Minister and that taken by the committee was, shortly, whether, upon the proper construction of the Act, an officer who had served less than 20 years could be entitled to an allowance. A rule *nisi* for *certiorari* was granted for the decision of the Minister to be quashed, on the ground that the Minister had acted without jurisdiction:— E

HELD: the Minister had not acted without jurisdiction, and, although his decision was in effect the construction of the provisions of the Act of 1909, it could not be questioned by the grant of a writ of *certiorari*. F

Decision of the Divisional Court (LORD HEWART, L.C.J., BRANSON and HUMPHREYS, JJ.) ([1938] 1 All E.R. 344) affirmed. G

[EDITORIAL NOTE.] The decision of the Minister was an important one, affecting the rights of a large number of employees of mental hospitals, and, in many cases, employees from whom, it is understood, the committee concerned have not collected superannuation subscriptions. The only question here is, of course, whether, in coming to such a decision, the Minister can be shown to have acted without, or in excess of, his jurisdiction. The terms of the Asylums Officers' H

Superannuation Act, 1909, s. 15, make it impossible to question such a decision unless the Minister can be shown to have so acted.

AS TO EXCLUSION OF CERTIORARI, see HALSBURY, Hailsham Edn., Vol. 9, pp. 870, 871, 888, 889, paras. 1470, 1493; and FOR CASES, see DIGEST, Vol. 16, pp. 436-444, Nos. 3003-3094.]

Cases referred to :

- A (1) *R. v. Murphy*, [1921] 2 I.R. 190; 39 Digest 341, case a.
 (2) *R. v. Woodhouse*, [1906] 2 K.B. 501; 16 Digest 398, 2421; 75 L.J.K.B. 745; 95 L.T. 367; *revsd.* on other grounds, *sub nom. Leeds Corpn. v. Ryder*, [1907] A.C. 420.
 (3) *R. v. Ministry of Health, Ex p. Wycombe Union* (1922), 92 L.J.K.B. 373; 37 Digest 214, 104; 128 L.T. 370.
 B (4) *Hough v. Windus* (1884), 12 Q.B.D. 224; 42 Digest 702, 1188; 53 L.J.Q.B. 165; 50 L.T. 312.
 (5) *R. v. Plowright* (1686), 3 Mod. Rep. 94; 16 Digest 437, 3018.
 (6) *Bradlaugh v. R.* (1878), 3 Q.B.D. 607; 15 Digest 637, 6791; *sub nom. R. v. Bradlaugh & Besant*, 48 L.J.M.C. 5; 38 L.T. 118.
 C (7) *R. v. Bolton* (1841), 1 Q.B. 66; 16 Digest 418, 2775; 10 L.J.M.C. 49.

APPEAL by the Glamorgan County Mental Hospital from an order of the Divisional Court (LORD HEWART, L.C.J., BRANSON and HUMPHREYS, JJ.), dated Jan. 13, 1938, and reported [1938] 1 All E.R. 344, where the facts are fully set out.

D *John W. Morris, K.C., G. D. Roberts, K.C., and Maurice Fitzgerald, K.C., for the appellants.*

The Solicitor-General (Sir Terence O'Connor, K.C.) and Valentine Holmes for the respondent.

Hector Hughes, K.C., and L. H. Shelton for Thomas Williams.

E *Morris, K.C.* : An officer is entitled to a superannuation allowance only if he has served for 20 years. In this case, the Minister had no jurisdiction to grant an allowance. He cannot consider the claim of a man who had had less than 20 years' service.

F *The Solicitor-General* : There was here a definite award made by the Minister on the facts, and no rule of *certiorari* lies. The only ground on which the court was moved to grant the writ was that the Minister had no jurisdiction. But clearly he had jurisdiction. There was a dispute, and everything that was done brought the matter within his jurisdiction. There is no suggestion that he acted other than properly.
 G [Counsel referred to *R. v. Murphy* (1), *R. v. Woodhouse* (2) and *R. v. Ministry of Health, Ex p. Wycombe Union* (3).]

H *Holmes*, following on the same side : The only question here is whether or not the Asylums Officers' Superannuation Act, 1909, s. 15, gives the Minister jurisdiction, and not whether or not his decision was final. It is said that he has come to a wrong decision under the Act, but that does not affect the question of jurisdiction.

Shelton : I adopt the arguments of the Solicitor-General and his junior.

Morris, K.C., in reply : The Minister had no jurisdiction to embark on the inquiry at all. There was no dispute within the meaning of the

section, and therefore he had no jurisdiction. An officer must have completed 20 years' service before any allowance can be made. Therefore, if someone with less than 20 years' service applies, there cannot even be a dispute. Sect. 11 gives no new right. It says: "to which he may be entitled under this Act." The word "final" is not conclusive. An arbitrator's award is final, but that does not mean that it cannot be A disturbed by the court. [Counsel referred to *Hough v. Windus* (4), *R. v. Plowright* (5), HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 9, pp. 880, 883, 886, 887, *Bradlaugh v. R.* (6) and *R. v. Bolton* (7).]

Roberts, K.C., following on the same side: The legislature gave to the Minister rights within certain limits. One of those limits was that an B applicant should have had 20 years' service. If he had not, the Minister had no jurisdiction.

GREER, L.J.: This is a case of very great importance and some difficulty, and no complaint can be rightly or properly made against C the visiting committee for having asked for *certiorari*, which they asked the Divisional Court to grant them, nor against them for appealing against the ultimate refusal of the Divisional Court to grant them that *certiorari*.

The facts are really not in dispute. In Apr., 1934, the committee D adopted a resolution of their wages sub-committee in the following terms:

That all members of the permanent staff shall be given the appropriate notice individually terminating his or her appointment on the staff on attaining the age of 65 years.

The claimant attained the age of 65 years prior to May 14, 1934, and, E in accordance with the said resolution, he was given notice in writing on May 7, 1934, to determine his employment on May 14, 1934, and his employment by the committee accordingly terminated on that day. The name of the man was Williams, and he had been engaged as a shoe-maker. However, it is quite clear, and not in dispute, that, though F he was a shoemaker by trade, he had, within the meaning of the Asylums Officers' Superannuation Act, 1909, become an "established officer or servant of the first class" referred to in sect. 2 of the Act, and was not a servant or officer in the second class. That has not been disputed by G the appellants in this case. He was dissatisfied with the view which was taken by the committee. He was not satisfied with his dismissal, and wanted the committee to grant him what he called a pension—that is, a superannuation allowance. He had not served for 20 years, and therefore was not entitled as of right under sect. 2 to receive the superannuation allowance which he claimed, and the committee refused to H grant him the allowance that he claimed, on the ground that they had no jurisdiction to do so. That is a possible view of the effect of the various sections of the Act of Parliament. However, under sect. 15 of the statute to which I have referred, it is provided:

In the case of any dispute as to the right to superannuation allowance of any

officer or servant of an asylum, or as to the amount of the superannuation allowance to which any such officer or servant is entitled, such dispute shall be determined by the Secretary of State, whose decision shall be final.

A The man Williams, having failed to get what he thought he ought to get from the committee, appealed, under that section I have read, to the Minister, substituted by order for the Secretary of State. The Minister decided in favour of the applicant. He said: "I think under
B some one or other of the provisions of the statute you are entitled to your superannuation," and, quite rightly, the Solicitor-General in his argument laid considerable stress upon the provisions of sect. 11 of the statute. I should say, before reading the section, that there was no
C dispute about the fact that this man had not served for the whole 20 years. He had been there, according to his own admission, and according to the dates in the records of the committee, for only 19 years, 2 months, and had not, therefore, served for 20 years. Nor was there any
D dispute that he had attained the age of 55. He was considerably more than 55. He was 65. Nor could there be any dispute that he was in fact asking the Minister to award him a pension or superannuation allowance. That is what he appealed to the Minister to award him, and the Minister did make an order, which is conveyed in a letter of June 10, 1937, which I think was addressed to Mr. Williams by the Assistant Secretary. It is in these terms:

E I am directed by the Minister of Health to refer to your appeal against the decision of the visiting committee of the Glamorgan County Mental Hospital relative to your claim to a superannuation allowance in respect of your service under the committee. In pursuance of the Asylums Officers' Superannuation Act, 1909, s. 15, the Minister hereby determines that you are entitled to receive from the visiting committee a superannuation allowance calculated in accordance with the provisions of the Act.

F That decision does not mean, as I read it, that the right to the superannuation allowance is a right given by sect. 15. It does mean: "Under the provisions with regard to my powers which are contained in sect. 15, I decide that you are entitled to a superannuation allowance."

G In order to see whether or not the Minister had any jurisdiction to make an order of that sort, one has to look, not merely at sect. 2 of the Act of Parliament, but also at sects. 10 and 11. Sect. 10 provides, as it seems to me, some argument in favour of the appeal in this case. It says:

(1) An established officer or servant who has not become entitled to a superannuation allowance, and who loses his office or employment by reason of reduction of staff [which is the present case], or of any other cause whatever other than his own misconduct or voluntary resignation, shall be entitled to receive the aggregate amount of his contributions under this Act.

H That applies apparently only to persons who have not become entitled to a superannuation allowance. No claim was made under that head, and, as I understood what was said by Mr. Morris in his excellent and frank argument, though they had not in fact exacted from him the contribution which he was bound to make, they were none the less bound to pay him the amount of the aggregate contributions that he would

have made if they had been willing to receive them. That, however, is unimportant if we come to the conclusion that sect. 11 had to be considered by the Minister as well as the other two sections to which I have referred, sects. 2 and 10. Sect. 11 provides as follows :

When an established officer or servant of the first class has attained the age of 55 . . . and the visiting committee of the asylum in which he is employed are of opinion that his retirement would be expedient in the interests of the service, it shall be competent for them to require him to retire upon payment to him of the superannuation allowance to which he may be entitled under this Act. . . .

It is unquestionable that Mr. Williams in this case has attained the age of 55. It is said that that can only be read as relating to any established officer or servant who has served the 20 years, which entitled him to a superannuation allowance under the provisions of sect. 2. That may be right, but it is unnecessary to express an opinion on the question as to whether it is or is not. I am rather inclined to the view that it was intended to give power to the committee, in the case of any established officer who had attained the age of 55, to say to him : " Please retire, and you will have your superannuation allowance." I find it difficult to see that it could have been inserted for any purpose other than that of enabling something to be done which could not be done in the absence of sect. 11—namely, the grant of a superannuation allowance to somebody who, otherwise than under the section, would not have received one. Be that as it may, we have not to decide that, because the Act of Parliament says that that is a matter, amongst other things, which has to be decided by the Minister, and, if the Minister has wrongly construed that section, still he has not acted without jurisdiction, because a mere misconstruction of this section would not entitle the committee to say that the order was made without jurisdiction.

I am not going to refer to all the authorities that were mentioned, because they seem to me a considerable distance away from the point we have to determine, but I should like to refer to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 9, p. 888, para. 1493, where the effect of the cases is summarised :

Where the proceedings are regular upon their face and the magistrates had jurisdiction, the superior court will not grant the writ of *certiorari* on the ground that the court below has misconceived a point of law. When the court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence. . . .

Here the proceedings are regular upon their face. If it be right to say that in this case all that was done by the Minister that could be made the subject of complaint and the ground for an application for *certiorari* was that he misconstrued the words contained in sect. 11 of the Act, that would not give the right to apply for *certiorari*. It would not support an order for *certiorari*. A rule *nisi* was granted for *certiorari* to bring up the decision of the Minister to be quashed. When the question as to whether or not it should be made absolute came to be

argued, the Divisional Court refused to make it absolute, and in doing so they seem to me—I say it with great respect to them—to have attached too much importance to the word “final” in sect. 15, because it might well be that there are cases in which there are provisions that the decision of a court or individual shall be final and conclusive, and yet, if it appears clear that there has been an excess of jurisdiction, then the order may be set aside. I think that here it is not established that there was any want of jurisdiction in the Minister to make the order he did, nor was there any excess of jurisdiction in making the order. Though the question is one of some difficulty, and my mind has wavered from time to time from one side to the other and back again, in the end I have come to the conclusion that the respondent is right in this case, and that the appeal must be dismissed.

SLESSER, L.J. : I am of the same opinion. The way in which Mr. Morris and Mr. Roberts have put this case for the appellants is this. They say that, when the Asylums Officers’ Superannuation Act, 1909, is properly considered, it appears from sect. 2 of that Act that, as regards an established officer of the first class, he must have been in the service of the asylum for not less than 20 years, and must satisfy the other conditions there stated, in order to justify any gift to him of a superannuation allowance. They say that, when the Act is considered, there is not to be found in the whole of the Act any other possible qualification for such a man to receive such an allowance, and that, as it is conceded that this man had not been in the service of the asylum for 20 years, it follows that, on the face of them, the proceedings before the Minister of Health must be bad, and that therefore a *certiorari* to quash ought to be granted. That, I think, fairly represents the argument, as I understand it, which has been addressed to us by the appellants. In my view, the argument is an erroneous one. When the statute is considered, it appears that it is at least very arguable that there is one other way in which a man may become entitled to a superannuation allowance, even though he has not served the 20 years stated in sect. 2. I refer to sect. 11, which does state that, when an officer has attained the age of 55 :
and the visiting committee . . . are of opinion that his retirement would be expedient in the interests of the service, it shall be competent for them to require him to retire upon payment to him of the superannuation allowance to which he may be entitled under this Act.

Then there follows a proviso :

Provided that nothing in this section shall prejudice the existing right of any visiting committee to dismiss any officer or servant employed in an asylum . . .

That proviso has reference, among other matters, to a section in the Lunacy Act, under which these persons are employed, in which it is stated—and it has been subsequently affirmed to be the right view by this court—that such officers hold office during the pleasure of their

employers.. On that view, therefore, sect. 11, in giving a power to dismiss an established officer or servant, would be quite meaningless and otiose unless it had some other significance. What is said by the respondent in this case is that it is an enabling section, giving a right to confer a superannuation allowance upon persons who have attained the age of 55 and are established officers of the first class in the events there stated—that is to say, if their retirement would be expedient in the interests of the service, notwithstanding that they had not served 20 years as mentioned in sect. 2 (1)—and that in such a case the annual amount, as provided in sect. 2 (1), shall be computed at the rate of one-fiftieth of his salary for each year of service, which in this case would be 19 years. It is pointed out, further, that that is not inconsistent with sect. 10, to which GREER, L.J., referred, which entitles a man who has lost his office for various reasons other than his own misconduct to receive the aggregate amount of his contributions under the Act, and which applies to persons under 55 years of age as well as those over it, and it is stated it is not to apply to a man who has become entitled to a superannuation allowance to which, it is argued, he is entitled, if he is over 55 years, under sect. 11. Therefore, in that view, not being over 55, and being within the class contemplated in sect. 11, he is entitled to receive both superannuation allowance and the amount of the contributions paid. Whether that view is right or not, it is at any rate a very arguable one. We are told that those whose duty it is to advise the authorities have taken the view that that is the correct interpretation of the statute. Be that as it may, this is clearly not a case in which, to my mind, it can be said at the highest that the Minister of Health has done anything more than arrive at an erroneous decision. I am by no means saying myself that his decision was erroneous. I am inclined, in company with GREER, L.J.—though it is unnecessary to decide that—to think that his view was probably correct. That point may some day have to be considered definitively. However, it is sufficient for this case to say that it is impossible to show any absence of jurisdiction in the Minister in exercising his powers under sect. 15 of the Act, where it is provided that :

In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum, or as to the amount of the superannuation allowance to which any such officer or servant is entitled, such dispute shall be determined by the Secretary of State [now the Minister of Health], whose decision shall be final.

I agree with what has been said by Mr. Valentine Holmes—that the question of the finality of the decision is not really decisive of the case at all. It is sufficient to say that the appellants fail to show that the Minister acted outside his jurisdiction. He may or may not have come to an erroneous decision within his jurisdiction, which was to decide this dispute. Therefore he may be in a position to say, when the matter has to be decided, if it ever has, as a matter of substantive law, that he is right. For the purposes of the present case, however, it is enough

to say that the appellants have failed to show that the Minister exceeded his jurisdiction, that they should not have obtained the rule *nisi* in the Divisional Court which they did obtain, and that the Divisional Court were right in discharging the rule when it came before them for argument.

A MacKINNON, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Torr & Co.*, agents for *D. J. Parry*, Solicitor to Glamorgan County Council, Cardiff (for the appellants) ; *The Solicitor, Ministry of Health* (for the respondent) ; *Booth & Booth*, Manchester (for Thomas Williams).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

C COLE v. YOUNG.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), October 14, 1938.]

D *Street Traffic—Motor vehicle—Brakes not maintained in good and efficient working order—Accident caused thereby—Whether car “equipped with efficient braking system”—Motor Vehicles (Construction and Use) Regulations, 1937 (S.R. & O., 1937, No. 229), reg. 34 (1).*

E The appellant's motor lorry became involved in an accident with another motor lorry driven in the opposite direction. After the accident, the brakes of the appellant's lorry were tested, and it was found that they were not maintained in good and efficient working order. The appellant was charged with having unlawfully used on a certain road the said motor lorry not equipped with an efficient braking system or efficient braking systems in either case having two means of operation, contrary to the Motor Vehicles (Construction and Use) Regulations, 1937, reg. 34. The justices convicted the appellant and fined him the sum of 10s. Thereupon this appeal was brought, and the appellant contended that the prosecution must prove that the appellant's lorry was not equipped with an efficient braking system or efficient braking systems ; that for this purpose it was not sufficient to prove merely that the brakes were not maintained in good and efficient working order ; that in order to establish the offence charged it must be proved that the braking systems, as systems, with which the appellant's lorry was equipped were not efficient braking systems ; and that the prosecution should have been brought under reg. 67 or reg. 68 of the regulations :—

G HELD : as the regulation in question draws a clear distinction between construction of braking systems on the one hand, and use on the other hand, the justices were wrong in drawing the inference, from the mere behaviour of a motor lorry at a particular time, that the braking system of the motor lorry was not efficient.

H [EDITORIAL NOTE. The Motor Vehicles (Construction and Use) Regulations, 1937, reg. 34, provides that every heavy motor car shall be equipped with an efficient braking system. The fact that a motor lorry on one occasion fails to act as though the brakes were efficient is not evidence that the system upon which the brakes are constructed is inefficient and not therefore in accordance with the regulation. The behaviour of the vehicle may be due to the user of the brakes, and not to the method of construction. It is therefore necessary, when an offence

under the regulation is alleged, that evidence of the construction of the brakes be given.

FOR THE MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS, 1937, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, pp. 833 *et seq.*; and FOR CASES, see DIGEST, Vol. 42, pp. 863-866, Nos. 147-170.]

APPEAL by way of case stated against a decision of the justices for the borough of King's Lynn in the county of Norfolk.

The Motor Vehicles (Construction and Use) Regulations, 1937, regs. 34 (1), 67 (1), 68, provide as follow :

34. Every heavy motor car registered on or before Aug. 15, 1928; shall be equipped with an efficient braking system or efficient braking systems with two means of operation sufficient under the most adverse conditions to bring the vehicle to rest within a reasonable distance. Save as aforesaid : (1) Every heavy motor car shall be equipped with an efficient braking system or efficient braking systems in either case having two means of operation so designed and constructed that notwithstanding the failure of any part (other than a fixed member or a brake shoe anchor pin) through or by means of which the force necessary to apply the brakes is transmitted, there shall still be available for application by the driver to not less than half the number of the wheels of the vehicle brakes sufficient under the most adverse conditions to bring the vehicle to rest within a reasonable distance.

67. (1) Every motor vehicle, every trailer drawn thereby and all parts and accessories of such vehicle and trailer shall at all times be in such condition, and the number of passengers carried by, and the weight, distribution, packing and adjustment of the load, of such vehicle or trailer shall at all times be such that no danger is caused or is likely to be caused to any person on the vehicle or trailer or on a road . . .

68. Every part of every braking system and of the means of operation thereof, all steering gear and every windscreen-wiper required by these regulations to be fitted to a motor vehicle or trailer shall at all times while the motor vehicle or trailer is used on a road be maintained in good and efficient working order and shall be properly adjusted.

Gerald Gardiner for the appellant.

The respondent was not represented.

LORD HEWART, L.C.J. : This is a case stated by justices for the borough of King's Lynn. It arises out of an information preferred by the respondent, who is the chief constable of that borough, under the Motor Vehicles (Construction and Use) Regulations, 1937, against this appellant. The charge was that the appellant on a day in Jan., 1938, unlawfully did use on a certain road a heavy motor car not equipped with any efficient braking system or efficient braking systems in either case having two means of operation contrary to the Motor Vehicles (Construction and Use) Regulations, 1937, reg. 34. The justices, having heard the information, convicted the appellant and fined him, and this case is stated upon the question whether in so determining the justices came to a correct determination in point of law.

The case is stated in such a way as to make it difficult to understand what exactly the justices accepted. The case begins, so far as form is concerned, by setting out what was admitted or proved in evidence. It was admitted or proved in evidence that the appellant was driving a Morris Commercial motor lorry, and that it became involved in an accident with another motor lorry going in the opposite direction. From that point on, however, the case takes the form, not of finding facts,

but of summarising statements made by the police constable, and, a little later, by the traffic examiner. The justices say that they came to the conclusion that reg. 34 was not complied with in the circumstances in which the appellant's motor lorry was being used, and that on the material date the appellant's motor lorry was not equipped with an efficient braking system or efficient braking systems. As Mr. Gardiner has pointed out in his argument, this code of regulations draws a clear distinction between construction, on the one hand, and use, on the other hand. There is a clear distinction between the facts which are said to belong to construction—the material construction of the thing—and the facts which are exhibited by the use. The justices here seem to have thought—if one can speculate as to what was in their minds—that from the behaviour of a motor lorry at a particular time it was possible without more to draw the inference that the braking system of the motor lorry was bad. In my opinion, there was nothing in the materials before the justices to justify the conclusion that the motor lorry was not equipped with an efficient braking system or efficient braking systems. The behaviour of the motor lorry exhibited an inference which was ambiguous, and the justices seem to have imputed to a system faults which, if they existed, were rather to be looked at from the point of view of user.

I leave out the other matters wherein the case is manifestly deficient. It seems to me that, upon the case as stated, there is nothing to justify the conclusion at which the justices arrived. I think, therefore, that this appeal ought to be allowed.

CHARLES, J. : I entirely agree.

MACNAGHTEN, J. : I agree.

Appeal allowed.

Solicitors : *Metcalf, Copeman & Pettefar* (for the appellant).

[Reported by MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

CARPENTER v. EBBLEWHITE.

[COURT OF APPEAL (Greer, Slessor, and MacKinnon, L.JJ.), October 14, 17, 18, 1938.]

Practice and Procedure—Action for damages for personal injuries caused by a motor car—Whether plaintiff can add defendant's insurance company as a defendant—R.S.C., Ord. 19, r. 27.

The plaintiffs had been injured by a motor car driven by the defendant B. It was in dispute whether the defendant E. had sold the car to B., or whether B. was driving it as his agent. The plaintiffs obtained leave to add E.'s insurance company as a defendant. In the statement of claim, the plaintiffs claimed, *inter alia*, a declaration that the insurance company was liable to satisfy any judgment obtained against E. or B. An application was made to strike out such portions of the statement of claim as referred to the insurance company as being frivolous and vexatious :—

HELD : (i) (*per* GREER, L.J.) the claim against the insurance company was frivolous and vexatious, as there could not be any claim for a

declaration in view of the fact that there was not at that time any dispute between the plaintiffs and the insurance company.

(ii) (*per* SLESSER, L.J.) the addition of the insurance company as a defendant would tend to embarrass the fair trial of the action. The old practice, whereby a jury should not be informed that a defendant motorist is insured, has not been altered by the passing of the Road Traffic Act, 1934.

(iii) (*per* MACKINNON, L.J.) the question of the liability of the insurance company depended primarily upon fact. A declaration of future liability is not, in such circumstances, a suitable remedy.

[EDITORIAL NOTE. It has long been the policy of the law that an action for personal injuries should be contested in ignorance of, and regardless of, the fact that the defendant is insured. The question here raised is whether the provisions of the Road Traffic Act, 1934, have so altered the position that the insurance company may be made a party to the main action. This addition to the parties of that action would avoid a subsequent action between the successful plaintiff and the insurance company, and would do much to reduce the costs in such cases; but, as the judgments herein clearly demonstrate, such addition is in many respects contrary to the policy of the law. As leave to appeal has been given, it may be that the opinion of the House of Lords on the point will be taken.

AS TO JOINDER OF DEFENDANTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 19, 20, para. 16; and FOR CASES, see DIGEST, Practice, pp. 407-413, Nos. 1077-1123. See also YEARLY SUPREME COURT PRACTICE, 1938, pp. 196-201.]

Cases referred to :

- (1) *Gowar v. Hales*, [1928] 1 K.B. 191; Digest Supp.; 96 L.J.K.B. 1088; 137 L.T. 580.
- (2) *Jones v. Birch Bros., Ltd.*, [1933] 2 K.B. 597; Digest Supp.; 102 L.J.K.B. 746; 149 L.T. 507.
- (3) *Cooper v. Wilson*, [1937] 2 K.B. 309; [1937] 2 All E.R. 726; Digest Supp.; 106 L.J.K.B. 728; 157 L.T. 290.
- (4) *Monk v. Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.
- (5) *Bailey v. Curzon of Kedleston (Marchioness)*, *Bailey v. Duggan*, [1932] 2 K.B. 392; Digest Supp.; 101 L.J.K.B. 627; 147 L.T. 269.
- (6) *Horwood v. Statesman Publishing Co.* (1929), 98 L.J.K.B. 450; Digest Supp.; 141 L.T. 54.
- (7) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; 30 Digest 147, 219; 84 L.J.K.B. 1465; 113 L.T. 98.
- (8) *Evans v. Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.
- (9) *Gower v. Couldridge*, [1898] 1 Q.B. 348; 9 Digest 137, 746; 67 L.J.Q.B. 251; 77 L.T. 707.
- (10) *Sadler v. Great Western Ry. Co.*, [1896] A.C. 450; Digest, Practice, 403, 1038; 65 L.J.Q.B. 462; 74 L.T. 561.

APPEAL from an order of GODDARD, J., dated July 29, 1938. The facts of the case are fully set out in the judgment of GREER, L.J.

J. G. Trapnell, K.C., and *Humfrey Edmunds* for the appellants.

H. D. Samuels, K.C., and *R. O. Armstrong-Jones* for the respondents.

Trapnell, K.C.: The only question here is whether or not the statement of claim contains a reasonable cause of action. These parties were properly joined, and the order sought for should have been made. If a separate action were later brought against these respondents, the

question of whether there was a sale of this car would be a vital question in both actions. It could easily be determined in one action. [Counsel referred to *Cooper v. Wilson* (3), *Monk v. Warbey* (4), *Bailey v. Curzon of Kedleston (Marchioness)* (5), and *Horwood v. Statesman Publishing Co.* (6).]

A *Edmunds*, following on the same side : Three questions will arise, negligence, damages, and the terms between Bellson and Ebbblewhite on which Bellson drove the car. These can all be decided in one action.

Samuels, K.C. : Except for the Road Traffic Act, 1934, there can be no liability of the insurance company at all. Even then there is none

B until a judgment has been recovered against a defendant. An insurance company should not be brought in as a party ; *Gowar v. Hales* (1), and *Jones v. Birch Bros., Ltd.* (2). [Counsel also referred to *Guaranty Trust Co. of New York v. Hannay & Co.* (7), *Evans v. Bartlam* (8), *Gower v. Couldridge* (9), and *Sadler v. Great Western Ry. Co.* (10).]

C *Trapnell, K.C.*, in reply.

GREER, L.J. : In this case, the plaintiffs, who alleged in the statement of claim that they were gravely injured by reason of the negligence of the defendant Lewis Henry Ebbblewhite, brought an action against

D Ebbblewhite in order to recover the damages to which they said they were entitled, because the accident had happened at a time when Ebbblewhite's servant or agent was driving the car, and was negligent whilst so driving the car on behalf of the defendant Ebbblewhite. It is quite clear that,

E the defendant Bellson, who was driving the car, was at all material times driving the said motor car as the servant or agent of the defendant, and they referred also in the next paragraph to the certificate of insurance. They asked for liberty to add the insurance company who had insured Ebbblewhite's third-party liability, and were allowed to join

F them as defendants. Then they claimed against the defendant insurance company in the same statement of claim in which they were claiming that Ebbblewhite was liable to them for the damages which they had suffered. This is to be found in paras. 6 and 7 of the statement of claim :

G The defendant company by letter dated Dec. 20, 1937, contends that it is not liable to indemnify the defendant Bellson or the defendant Ebbblewhite against the claims of the plaintiffs or any of them for damages for the said bodily injuries caused by the said negligence of the defendant Bellson and further contends that it is not liable to satisfy any judgments which may be given against the defendant Bellson or the defendant Ebbblewhite in respect of the matters complained of in paras. 1 and 2 hereof. In the alternative to the allegations contained in paras. 4 and 5 hereof the plaintiffs repeat paras. 1, 2, 3 and 5 hereof and say that the defendant H Ebbblewhite was guilty of a breach of his duty under the Road Traffic Act, 1930, s. 35, and that by reason of such breach the plaintiffs and each of them have suffered damage. Each of the plaintiffs claims : (1) Under paras. 1 and 2 hereof, damages against the defendants Bellson and Ebbblewhite. (2) Under paras. 1-6 (both inclusive) hereof a declaration that the defendant company is obliged to satisfy any judgment obtained under subpara. (1) of the prayer herein against the defendants Bellson and Ebbblewhite or either of them. (3) Under para. 7 hereof damages against the defendant Ebbblewhite.

Then it is quite clear that what the defendant was saying definitely was, as we were told: "Bellson in driving the car was not my servant or agent. I had sold the car to him, and he was therefore not driving on my behalf." It seems to me that no dispute has arisen between the insurance company and the defendant Ebbblewhite, nor can any dispute arise until after the disposal of the action as between the plaintiffs and Ebbblewhite. The insurance company cannot say, and are not in a position to say, whether or not they are under any liability to Ebbblewhite. If upon the true facts there was no sale of the motor car, and if upon the true facts Bellson was driving as the servant or agent of the defendant Ebbblewhite, or if upon the true facts the collision and damage were caused by any negligence on the part of the defendant Ebbblewhite, then the insurance company would be quite unable to dispute their liability. They have never said that, if those are the true facts which are the facts alleged in the statement of claim, then there would not be a right of indemnity. They do say, however—and that accords with the plaintiffs' own view—that, if those facts are not established, if, on the contrary, it is established that the defendant is not liable either on the ground that Bellson was not his servant or on the ground that there was no negligence on the part of the driver of the car, then there would be no indemnity due from the insurance company to anybody. It has never been determined that there can be a claim for a declaration where no dispute has arisen between the plaintiff and the defendant, and it would not have made any difference if this claim had been made in a separate action. It would still have been frivolous and vexatious—at any rate, vexatious—to bring an action before the dispute has arisen.

It seems to me that it is wrong and entirely premature at the present time to determine in this action, or even in a separate action, a dispute which has never arisen between the parties at all. I do not think it would make any difference whether the claim was made in an action against Ebbblewhite by joining the insurance company. It would be a claim that ought not to be entertained by the court, because at the time of the claim there was not in existence any dispute between the parties on the only question involved in that action, whether it is part of the action against Ebbblewhite or an independent action. It seems to me, in these circumstances, that, under R.S.C., Ord. 19, r. 27, the judge's decision was right, though I do not agree with the reasons which have been advanced by Mr. Samuels for saying that it was right. R.S.C., Ord. 19, r. 27, provides as follows:

The court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid between solicitor and client.

It seems to me that it is embarrassing to bring an action for a declaration when no dispute has arisen between the parties in respect of the matter

which is the subject-matter of the claim. For these reasons, I have come to the conclusion that we ought not to disturb the decision of the judge.

A With regard to the point which was made by Mr. Samuels, on behalf of the respondent, that the joining of the insurance company in the action is embarrassing because it would be necessarily unavoidable that the jury should know that there could not be any claim against the insurance company unless they decided the case in favour of the plaintiff, that reasoning does not appeal to me at all, because, since the time that it has been provided by statute that every owner of a motor car must be insured, that matter would be present to the minds of the jury just as much, though not a word was said about it, as if it was proclaimed from the house-tops. For the reasons I have indicated, I think that the judge's decision was right, and that this appeal must be dismissed.

C SLESSER, L.J. : Although I have come to the same conclusion that this appeal should be dismissed, I have come to that conclusion for reasons different from those stated by GREER, L.J., and, therefore, I think it necessary to give a separate judgment. On the matter with which Greer, L.J., has dealt I would prefer to express no conclusive opinion. I understood that in the course of the argument Mr. Samuels said that he was not prepared here to argue, but that it might be, that a separate action claiming the declaration that has been added to the statement of claim in this case might lie. I am impressed by the views which GREER, L.J., has expressed in contradiction of that argument, but, at the same time, I am also impressed by the fact that it may be said that here was a dispute between the insurance company and the plaintiff in respect of the risk which the insurance company was carrying, and, therefore, there was a dispute, whether the appropriate section of the Road Traffic Act, 1934, did or did not apply. There was a dispute whether sect. 10 in particular, which might conceivably found an action for a declaration if it were brought as a separate proceeding, applied to this case. As I say, on that point I express no concluded opinion. The reason I have come to the conclusion that, within the meaning of the rule to which GREER, L.J., referred, this adding of the claim against the insurance company for a declaration would tend to embarrass the fair trial of the action, is this. I think that there can be no doubt that, before the passing of the Road Traffic Act, 1934, such an addition would be embarrassing. It has been already held in this court that, where it was sought to bring in the insurance company insuring the defendant by means of a third-party procedure, that would tend to embarrass the trial of the action as between the plaintiff and the defendant, if only for the reason that it would almost with certainty necessitate telling the jury that there was in that case an insurance. In *Gowar v. Hales* (1), SCRUTTON, L.J., said, at p. 197 :

. . . It has been established as a rule of practice at the bar which the judges

enforce, that in an action against a motorist, the jury ought not to be told that the defendant is insured. Whether the way of enforcing it is, as has been done in one case cited to us, to discharge the jury when the fact has been told them, or whether it is, as in the case before BRANSON, J., to say it is an error of judgment on the part of the counsel who has mentioned it but that the judge should endeavour to put it right by his summing-up, it is not necessary to decide here. There was this undoubted rule of practice on which the judges acted; and to have a rule of practice that a jury should not be informed that the defendant is insured, and for the judge at the same time to bring in the insurance company to take part in the trial of the action as the judge shall direct and be bound by the result of the trial, seems to me to be entirely inconsistent. A

That was the view taken by the court in 1927, before the passing of the Road Traffic Act. Then we find that in *Jones v. Birch Bros., Ltd.* (2), SCRUTTON, L.J., at p. 606, recites again what he had said in *Gowar v. Hales* (1), and indicates that it has been a universal practice in dealing with this class of case, which, as I read his judgment, is not necessarily limited to cases where there is a jury. B

I ask myself, in those circumstances, that being clearly the law at that time, whether the fact that the Road Traffic Act, 1934, with certain specified exceptions, requires insurers under that Act to satisfy judgments against persons insured in respect of third-party risks makes a difference to the old rule. Looking at the facts of this particular case, I think that it would be wrong here to say that the statute has altered the rule, and for this reason: this is not a case where it is admitted that, if the plaintiff succeeds, automatically the insurers become liable. It is a case where the contention of the insurers, as expressed in the correspondence, is that, at the time of the accident, the person causing the injury was not driving as the agent of the insured person, but had purchased the car, and was himself the owner of the car, and outside the policy altogether. C In those circumstances, a discussion as to this declaration must inevitably have the result that, if the jury find one way they will know they are finding on the question of whether or not, the car has been purchased. They will know that they are finding for the plaintiff, in effect, against an insurance company. They will know, on the other hand, that, if D they have decided that the car has been purchased, as the insurance company say, by the driver of the car, then they will be finding for a man who possibly is a man of straw, with no insurance company behind him. That would involve a consideration, as it seems to me, of the fact E that the party may be injured just as much and as cogently and as prejudicially as would have been the case before the passing of the Road Traffic Act, 1934. While I say nothing about circumstances which might arise when the dispute with the insurance company was not of this sort, in the present case, having regard to the issues between the parties, I do not think that it can be said on behalf of Mr. Trapnell's client that it F is so certain that the defendant was insured that the jury must be taken to have known it in any event, and the mischief which the earlier cases seek to guard against no longer exists. I think, therefore, that, in the circumstances, this case does fall within the class of case mentioned in *Gowar v. Hales* (1), and I have come to the conclusion that it would tend G H

to embarrass the action if a declaration against the insurance company were sought in the present proceedings.

I would only add that Mr. Trapnell at one stage in the argument said he was willing, in order that this claim for a declaration should proceed, to abandon the claim to a jury. For the reasons I have given, though
A the result of that would not be as objectionable as if there were a jury, I think, nevertheless, that the objection would not be altogether removed. I think that the rule is of general application with regard to third-party procedure, though there again, of course, another question—as to whether the insurance is an indemnity, and, therefore, within the rule—has been
B canvassed, but is not germane to the matter here to be considered. I think that the old practice in these cases prevails, and that nothing in the statute has altered the position. The position seems to me to be the same whether we are considering third-party procedure or considering an application to add the insurance company as a defendant. There-
C fore, for those reasons, as I say, though expressing no concluded opinion upon the validity of an action for a declaration brought as a separate cause, I think that in the present case the proceedings are wrongly conceived, and the appeal fails.

D MACKINNON, L.J. : I agree that this appeal should be dismissed. I would only add that the alternative claim against the insurance company is a claim for a declaration of future liability. Such a claim is permissible, and it is one which is within the discretion of the court, and primarily, I think, is designed to deal with declarations of liability on a
E question of law. Some questions of fact, of course, may be involved, but in this case there is no question of law as to the possible liability of the insurance company. There is no doubt whatever that, if they have insured Ebbblewhite, or anybody driving with his consent, they are liable both under their policy and under the statute. All the questions which
F are involved in determining whether or not ultimately the insurance company may be liable are pure questions of fact. That, I think, is an additional reason, or one aspect of the reason, which, I think, GREER, L.J., very properly emphasised. I agree that the appeal fails and should be dismissed.

G *Appeal dismissed with costs. Leave to appeal.*

Solicitors : *Arnold Carter & Co.* (for the appellants) ; *A. D. Vandamm & Co.* (for the respondents).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

**R. v. BRADFORD LICENSING JUSTICES, *Ex parte*
ILLINGWORTH.**

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten,
JJ.), **October 19, 20, 1938.**]

Intoxicating Liquors—Licensing—Permitted hours—Extension—“Special requirements of the district”—Licensing Act, 1921 (c. 42), s. 1 (1). A

Certain licensing justices made an order under the Licensing Act, 1921, s. 1, directing that with regard to licensed premises within their jurisdiction the permitted hours should be extended during the summer months as specified in the order. Before making the order, the justices heard evidence which satisfied them that the special requirements of the district rendered the order desirable. The evidence was to the effect that during the summer months many inhabitants by reason of recreation and hours of work could not obtain reasonable refreshment before 10 o'clock. The applicant sought to have the order quashed, on the ground that it was made without jurisdiction, in that there was no evidence before the justices of any “special requirements of the district” within the meaning of sect. 1 of the Act of 1921 :— B

HELD: quite apart from the weight of the evidence, which was essentially a matter for the justices themselves, there was a mass of evidence of “special requirements of the district,” upon which the justices were entitled to make the order, and there was no usurpation of jurisdiction. C

EDITORIAL NOTE. The policy of the Licensing Act, 1921, s. 1 (1), which allows licensing justices to extend the permitted hours, is that the effect of the evidence is a question to be determined by the justices themselves, and, if there is any evidence whatever before them with regard to the special requirements of the particular locality, it is not possible to question their decision by way of a writ of *certiorari*. The matter is left to the discretion of the local justices, and their decision can only be made the subject of an appeal if they have acted without, or in excess of, their jurisdiction. D

AS TO PERMITTED HOURS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 103, 104, para. 247; and FOR CASES, see DIGEST, Supp., Intoxicating Liquors, Nos. 582a-582d.] E

Case referred to :

- (1) *R. v. Wisbech, Isle of Ely, Licensing JJ., Ex p. Payne*, [1937] 2 K.B. 706; [1937] 3 All E.R. 767; Digest Supp.; 106 L.J.K.B. 874; 157 L.T. 533. F

APPLICATION to make absolute a rule *nisi* for *certiorari* directed to the licensing justices of the city of Bradford, to show cause why an order made by them on or about Mar. 9, 1938, under the Licensing Act, 1921, s. 1, should not be quashed. G

Application was made on Mar. 9, 1938, to the licensing committee for the city of Bradford by the Bradford Licensed Victuallers' Association to extend the hours of opening of licensed premises in the city during the period of summer time, Apr. 10 to Oct. 2. The justices composing the licensing committee held that the special requirements of the district rendered it desirable that the application for the months of May, June and July should be granted, and in coming to this conclusion acted upon the following facts : H

(a) The textile workers in the city who formed a large proportion of the population of the licensing district had no opportunity of enjoying

the various forms of sport such as tennis, cricket, bowls and physical training organised under the National Fitness Campaign, until after their evening meal, and during the months of May, June and July, such recreation and exercise were often continued until as late as 10 p.m.

A (b) Many persons in the city of Bradford were holders of allotment gardens, and during the months of May, June and July, often worked in their gardens as late as 10 p.m.

B (c) Certain persons in the city of Bradford engaged upon nightwork as newspaper executives, worked from 6.30 p.m. until 2.30 a.m., with a single break of half an hour between 10 p.m. and 10.30 p.m., and there were also railwaymen and post-office employees who worked during the night, and such persons, so long as licensed premises closed at 10 p.m., were unable to use such licensed premises during that interval for their reasonable refreshment.

C (d) The licensees in the city of Bradford reasonably complained of the inconvenient and undesirable rush of customers entering their premises only a few minutes before 10 p.m., and were forced to leave those premises only a few minutes later, and the extra half-hour for which they applied would secure greater comfort and convenience for themselves and their customers.

D Evidence in support of the application was given by 7 witnesses representing over 53,000 persons resident in the licensing district. No evidence was called in opposition to the granting of the application.

Christmas Humphreys showed cause on behalf of the local justices.

D. N. Pritt, K.C., and *Neil Lawson* in support of the rule.

E *Sidney H. Lamb* for the representative of the local licensing association.

F LORD HEWART, L.C.J.: This is a rule *nisi* for a writ of *certiorari* to be directed to the licensing justices for the city of Bradford, to remove into this court an order made by them on or about Mar. 9, 1938, directing that with regard to the licensed premises :

G . . . in the city and county borough of Bradford the permitted hours on week-days shall be between the hours between half-past eleven in the morning and three in the afternoon, and between half-past five in the afternoon and ten at night during the months of January, February, March, April, August, September, October, November and December, and during the months of May, June and July the permitted hours on week-days shall be the hours between half-past eleven in the morning and three in the afternoon, and between half-past five in the afternoon and half-past ten at night; and on Sundays, Christmas Day and Good Friday shall be the hours between twelve noon and two in the afternoon and seven and ten in the evening.

H The grounds upon which the rule was asked and obtained were that the justices of the city had no jurisdiction to make the order in question, and that there was no evidence upon which they could make such order. It is common ground that that twofold statement of grounds amounts to no more than one. The point is that there is no evidence, it is said, upon which the justices could make the order. The basis of a writ of *certiorari*, and the grounds upon which the court acts in granting a writ



of *certiorari*, are that there has been a usurpation, or—what is in effect the same thing—an excess, of jurisdiction. The essence of the matter is that the justices have assumed to themselves a jurisdiction which in fact and in law they have not. The question which immediately faces one in this case is how it can reasonably be said that these justices had no jurisdiction. How can it reasonably be said that there was no evidence upon which they could make any such order as that of which complaint is made ?

One naturally turns to the statute which in this matter prescribes the duty of justices. By the Licensing Act, 1921, s. 1 (1), it is provided as follows :

The hours during which intoxicating liquor may be sold or supplied on weekdays in any licensed premises or club, for consumption either on or off the premises, shall be as follows, that is to say : eight hours, beginning not earlier than eleven in the morning and ending not later than ten at night, with a break of at least two hours after twelve (noon) : Provided that (a) in the application of this provision to the metropolis " nine " shall be substituted for " eight " and " eleven at night " shall be substituted for " ten at night " ; and (b) the licensing justices for any licensing district outside the metropolis may by order, if satisfied that the special requirements of the district render it desirable, make, as respects their district, either or both of the following directions—(i) that this provision shall have effect as though " eight and a half " were substituted for " eight " and " half past ten at night " were substituted for " ten at night " ; (ii) that this provision shall have effect as though some hour specified in the order earlier than eleven, but not earlier than nine, in the morning were substituted for " eleven in the morning."

It is manifest that, by that Act, which contemplates indeed a normal method of uniformity, but at the same time carefully provides elasticity in certain circumstances, the justices have the duty of determining, if the question arises, whether the special requirements of the district in which they have jurisdiction render it desirable to depart from the normal standard and make the special provision. In order that the justices may make up their minds, what they have to do is to decide whether the special requirements of the district render it desirable that a departure from the normal hours be made. If I may be permitted to reiterate what I said in *R. v. Wisbech, Isle of Ely, Licensing JJ., Ex p. Payne* (1), at p. 708 ([1937] 3 All E.R. at p. 768) :

It is quite obvious that the purpose of that enactment is to call in and rely upon the local justices, who, according to the Act, are to be satisfied that the special requirements of the district render the substitution of hours desirable. That, I think, is an essential part of the scheme of this legislation. There is a general rule, but that general rule is to be supplemented or corrected by elasticity based upon the judgment of local justices with regard to the special requirements of the particular locality.

In this case, it is clear that the justices were addressing their minds precisely to one of the tasks which the legislature has put upon them. They were asking themselves the appropriate question : Do the special requirements of this district render it desirable to make the directions which are asked ? Asking themselves the appropriate question, it seems to me that they directed their minds to the relevant evidence.

Mr. Pritt, in his very careful argument, reminded us of the salient features of the evidence. It is manifest, I think, that nothing could be

further from the truth than to suggest that there was no evidence. There was, on the contrary, a mass of evidence, divisible into various categories, and showing under various heads what was the nature of the special requirements upon which the application for a departure from the normal standard had been based. It is not necessary to re-read the salient passages of that evidence, but it seems to me impossible, except for controversial purposes, to suggest that there was not evidence upon which the justices might act. It is not necessary for us to consider the weight of that evidence. That is a matter essentially for the justices themselves. However, it seems to me wholly impossible in this case to say that the justices acted without evidence. There was a variety, and there was a mass, of evidence. That being so, it seems to me that, upon proper evidence, duly considered, the justices arrived at a conclusion of the precise kind which the statute contemplated as suitable to certain circumstances. I cannot see the slightest ground for holding that there was here anything in the nature of usurpation, or any degree of excess of jurisdiction. It seems to me that these justices in a proper case were directing their minds to the relevant question, and were deciding it upon fairly good evidence. That being so, I think that the rule must be discharged.

CHARLES, J. : I agree.

MACNAGHTEN, J. : I agree.

Rule discharged, with costs to justices and to representative of local licensing association.

Solicitors : *Ridsdale & Son*, agents for *H. M. Dawson*, Bradford (for the justices); *Neave & Neave*, agents for *Heap & Heap*, Bradford (for the applicant); *Goddard, Holme & Ward*, agents for *Pullan, Davies & Co.*, Leeds (for the representative of the local licensing association).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

EVANS v. NATIONAL UNION OF PRINTING, BOOKBINDING, AND PAPER WORKERS.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
October 19, 1938.]

Trade Unions—Rules—Member leaving employment without notice—Rule providing for suspension for such conduct—Rule providing for expulsion upon conduct detrimental to interests of the union—Expulsion of member—Validity.

The plaintiff, a member of the London Central branch of the defendant union, was expelled after inquiry by his union. The plaintiff was a casual jobbing hand in the employment of an important firm of printers and bookbinders. He complained that he was not given a fair share of the work distributed, and, without notice, absented himself and sought other employment. The branch committee, when they came to consider the case, were of opinion that he should have accepted the work offered.

The plaintiff still refused to accept the work and, after a further hearing at which he was in effect charged with insubordination, the executive committee expelled him from the union. The general rules of the union specially provided the penalty of suspension from out-of-work benefit for the case of a member leaving his employment without notice and refusing to accept work without a satisfactory reason being given. There was also a rule under which a member who knowingly acted to the detriment of the interests of the union might be expelled and all money he had paid into the funds of the union forfeited. The question raised in this action was whether the only penalty to which the plaintiff had subjected himself was that of suspension under the first rule, or whether he could be expelled from the union altogether under the provisions of the second rule, and the plaintiff asked for a declaration that the action of the defendants in expelling the plaintiff from the union was *ultra vires* and illegal under the rules:—

HELD: in the circumstances, the defendants were entitled to expel the plaintiff on the general ground that he had acted to the detriment of the interests of the union.

[EDITORIAL NOTE.] The courts have already decided that a member cannot be expelled from a union unless there is an express rule providing for expulsion, and, even where there is such a rule, he must be given a proper hearing before the right of expulsion is exercised. These decisions show a tendency towards limiting the power of expulsion within the strictest limits, and it might have been inferred that, where there was an opportunity of dealing with a member under a rule imposing a penalty less than expulsion, the court might have insisted upon the offender being dealt with under that rule. In the present case, it is true that there was an opportunity of dealing with the offender otherwise than by expulsion, but it will be noted that, after the hearing before the branch committee, he persisted in conduct of which that committee had expressed disapproval, so that it could be said that he had committed a greater offence than that of absenting himself from work without proper notice or justifiable cause.

AS TO EXPULSION OF MEMBERS FROM A UNION, see HALSBURY, 1st Edn., Vol. 27, Trade and Trade Unions, pp. 626, 627, para. 1173; and FOR CASES, see DIGEST, Vol. 43, pp. 98-101, Nos. 1033-1047.]

Case referred to:

- (1) *Robbins v. National Union of Printing, Bookbinding, & Paper Workers* (1936), *Times Newsp.*, June 20.

ACTION for a declaration that the defendant union had no power to withdraw his union card and expel him from the union, and asking for an injunction.

Hon. Dougall Meston for the plaintiff.

N. L. C. Macaskie, K.C., and *M. R. Nicholas* for the defendants.

Meston: The defendants acted *ultra vires* when they purported to expel the plaintiff from membership of the union. The plaintiff's offence was that of absenting himself from work without notice or good reason. Rule 21 specifically deals with such a case, and provides that the penalty shall be suspension from out-of-work benefit. This is the only penalty to which the plaintiff rendered himself liable. There was no power to invoke any other rule to deal with the same offence, and the expulsion of the plaintiff was *ultra vires*.

GODDARD, L.J.: In case this case should go further, I had better set out as clearly as I can the course which the case has taken. Mr.

A Meston, who opened the case with commendable frankness, told me that there is only one short point in the case, and that is whether or not, upon the facts, which are not in dispute, and which appear upon the documents (because no evidence has been given except documentary evidence), the committee had power to act under r. 24 (2) (f) and to expel the man, in these circumstances. The plaintiff had been accepted by the union as a member on the terms—no point has been made about this—that he was to work for Messrs. W. H. Smith & Son. It seems that a complaint was made against the plaintiff to his union on Apr. 30 that he had absented himself from work at Messrs. W. H. Smith & Son without giving the usual notification, with the result that a non-unionist had been engaged to do his work. Accordingly he was summoned before the branch committee to answer that complaint, and the branch committee considered this matter on May 19. Under r. 21 of the union's rules, it was provided :

C Should members leave their situations without proper notice to their employers (unless by mutual consent, or under circumstances which the branch committee may consider justifiable), or lose their employment through misconduct, it shall be within the power and discretion of the branch committee to suspend such offending members from out-of-work benefit for one or more weeks. . . .

D It is also provided by r. 21 (4) :

Any member refusing to accept work at the trade without a satisfactory reason being given shall be suspended from all benefits for such period as the committee may resolve upon, and shall not be allowed to sign the call-book during such period.

E There was no necessity, as far as I can see, for the committee to have taken any steps about suspending him from benefit, because he was not claiming benefit. The complaint made against him was that he refused to accept work which had been offered, because he had absented himself from his work.

F The union thereupon, on May 19, having considered the case and heard Mr. Evans, instructed him that he was to accept the work which he was offered. The resolution was :

That Evans be instructed to accept the six early mornings offered.

G That did not suit Mr. Evans. He did not like the work. He may have had good reasons, he may have had bad reasons. I express no opinion about it, because it is nothing to do with me. However, he would not obey the instruction given him by the committee. Thereupon he was again summoned to appear before the committee. The complaint then against him was, as is clearly shown by the letter, that of refusing to carry out the instructions of the branch committee. In other words, it was a charge of insubordination, if one might use that word. It is a disciplinary matter. He had been instructed to accept work and he said :
H "I will not accept work. I will not do what you tell me." Thereupon, since he took up that attitude, the branch committee considered that it was a case which was fit for the application of r. 24 (2), which renders a member liable to expulsion, among other things :

. . . (f) if he has knowingly acted to the detriment of the interests of the union.

The branch committee held a meeting, and, as I must assume from their finding, they considered apparently—no one has challenged the honesty of their decision, and it would not really matter, because it went to the executive council—that Mr. Evans' conduct amounted to knowingly acting to the detriment of the interests of the union—as, of course, it would be. A

As I said in the course of the argument, the great benefit of a trade union is that you can have collective bargaining between employers and employed, and, if the union come to an arrangement or come to a decision regarding any man or body of men, and then that man or body of men refuses to be bound, it destroys the confidence that should exist between the employers and the union, and is to the detriment of collective bargaining. I have no doubt that that is the view which the committee took. When Evans refused to abide by their decision, and refused to accept the work which was offered him, the committee decided to recommend the national executive council to expel Evans. Then proper notice of the meeting of the national executive council was given to Mr. Evans, who attended the national executive council. He laid a case before them, and the minutes show that the executive council considered this case very fully, and came to the conclusion that the recommendation of the branch committee should be adopted. I cannot see how they acted *ultra vires*. They decided, in other words, that, in defying the instruction given by the branch committee, and refusing to be bound by their direction, Mr. Evans had knowingly acted to the detriment of the interests of the union. That was a decision to which they could come. There is nothing contrary to natural justice in it. They gave Mr. Evans a hearing and came to that decision. I cannot interfere with their decision, and this action fails, and must be dismissed with costs. B C D E

Judgment for the defendants with costs.

Solicitors: *C. Patrick B. Knight* (for the plaintiff); *Pattinson & Brewer* (for the defendants). F

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re BROWNLIE, BROWNLIE v. MUAUX. G

[CHANCERY DIVISION (Simonds, J.), October 19, 1938.]

Wills—Construction—Gift to person and the descendants of his branch of the family—Whether construed as entailed interest—Indefinite gift of income—Law of Property Act, 1925 (c. 20), s. 130 (2). H

The testatrix made her will in the French language and included a gift of which the following is the English translation: "I bequeath to B. for her life and after her death to her son L. should he survive her the life interest in my holding of War Loan. . . . This life interest will remain the property of the descendants of the B. branch of the family until extinct." At the date of the will, L. in fact had descendants.

Upon a summons, the question was raised as to what interest L. took under this clause:—

HELD: (i) this was not an indefinite gift to L. of the rents and profits so as to be equivalent to an absolute gift.

(ii) "the descendants" were not exclusively the descendants of L., and therefore the gift could not be construed as creating an entailed interest under the Law of Property Act, 1925, s. 130 (2).

(iii) L. took a life interest only, and, subject to that, the holding of War Loan fell into residue.

[EDITORIAL NOTE. The Law of Property Act, 1925, s. 130, permits the creation of entailed interests in personalty, and, for the creation of such interests, expressions are to be construed in the same way as that in which before 1926 they were construed in relation to freehold land. The expression in the will under consideration could, if applied to freehold land, only create an entailed interest if the term "descendants" could be referred to the descendants of L. only, and, further, if such descendants of L. would take not as a class, but in succession. Such construction has been found impossible in the present case, and the construction that the clause is an indefinite gift of income amounting to a gift of the corpus has also been rejected.

AS TO GIFTS CREATING AN ESTATE TAIL, see HALSBURY, 1st Edn., Vol. 28; Wills, pp. 787-791, paras. 1437-1440; and FOR CASES, see DIGEST, Vol. 44, pp. 1015-1026, Nos. 8728-8844.]

ADJOURNED SUMMONS asking for the determination by the court of the question as to whether, upon the true construction of the will of Constance Brownlie, dated Nov. 27, 1925, and in the events which have happened, the plaintiff is now entitled to (a) a life interest, (b) an absolute interest, or (c) some other and what interest in the sum of £9,360 3½ per cent. War Loan set aside by the first two defendants as executors of the will to answer the settled legacy of "my holding of War Loan of £9 a week" and the investments representing the same.

C. *Montgomery White* for the plaintiff.

R. H. *Hodge* for the first two defendants, executors and trustees under the will.

H. *Lightman* for the third, fourth and fifth defendants, representing descendants of the Brownlie family.

B. S. *Tatham* for the last defendant, representing charities in Nice.

SIMONDS, J.: In this case, the testatrix died on Nov. 20, 1930, having made her will in the French language. It appears that a translation of that will was admitted to probate, but what exactly happened to the original will, whether it was registered with the translation or not, is not clear. However, it is generally conceded, I think, that I am entitled, for the purpose of determining the rights of the parties, to look at not only the translation, but also the original will, which is in French. The translation of the material part of the will is this:

I bequeath to Madame Brownlie, widow, residing at . . . for her life and after her death to her son Leer Brownlie should he survive her the life interest in my holding of War Loan of £9 a week. This life interest will remain the property of the descendants of the Brownlie branch of the family until extinct. In addition, I bequeath to my nephew Leer Brownlie the sum of £4,000 of War loan.

The question is whether, under the terms of that bequest, the plaintiff described in the will as "Leer Brownlie" is entitled to anything more

than a life interest in the sum of War Loan described by the testatrix as her "holding of War loan of £9 a week." The first life tenant, if I may so call her, Madame Brownlie, died on Apr. 26, 1936, so that the question has now become a present one.

It has been argued on behalf of the plaintiff, Leer Brownlie, that either he has, under the terms of this will, an absolute interest, or, by the application of the Law of Property Act, 1925, s. 130, he has an estate tail in this sum of War Loan which he has in fact disentailed.

With regard to the first contention—that he is entitled to an absolute interest—I hold that, upon the construction of this will, he has no such interest. It is, I think, impossible to treat this as a case where the beneficiary is given an indefinite gift of income of rents and profits, which is equivalent to the income of the corpus. Here there is in terms, according to the English translation, a life interest, which is a translation of the French *l'usufruit*. It is impossible, when he is given that, and then that same property is given over to other persons, to treat it as being an indefinite gift to him of the rents and profits, so as to be equivalent to an absolute gift.

The alternative which is suggested is an attractive one—namely, that, as a result of the Law of Property Act, 1925, s. 130 (2), he has an estate tail. It would be a strange application of sect. 130 to apply it to a disposition in the French language, using French terms of art. Nevertheless, if it were applicable, I should apply it. Sect. 130 (2) provides as follows :

Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.

That involves the consideration whether this language would, in the case of real estate, before the passing of the Law of Property Act, be apt to create an entailed interest, if the property in question were freehold land. Let me read it again. It is a gift, after the death of Madame Brownlie, to her son, should he survive her, of the life interest in a certain sum of money :

This life interest will remain the property of the descendants of the Brownlie branch of the family until extinct.

It appears to me that the argument rests upon two assumptions—first of all, that I may construe the "descendants of the Brownlie branch of the family" as meaning the descendants or issue of the plaintiff himself, and, secondly, having adopted that construction, I am at liberty further to say that a gift to the descendants means a gift from father to son of the plaintiff, and not a gift to the descendants as a group taken together.

It is unnecessary for me to decide whether or not I could accede to

the second part of that proposition, for, upon the language of this will, it does not appear to me that I would be justified in saying that by "the descendants of the Brownlie branch of the family" the testatrix has indicated with sufficient clearness that she means the descendants of the plaintiff himself. I do not think that she had that in mind. I think that what she had in mind is this, and it is perhaps relevant to know—that, at the date of the will, as now, the plaintiff himself had descendants. I think that the testatrix meant nothing more than that the sum of money was to remain in the Brownlie branch of the family, whether they were descendants of the plaintiff himself or were descendants of somebody else. If that is so, then it is impossible to say that this language was apt, before the Law of Property Act, if it were applied to land, to create an estate tail interest in favour of the plaintiff. Accordingly, though I come somewhat reluctantly to the conclusion, I must hold that the plaintiff takes a life interest only in this property, and, subject to that, it must fall into residue.

Solicitors: *Nash, Field & Co.* (for the plaintiff and for the third, fourth and fifth defendants); *A. & G. Tooth* (for the first two defendants and for the last defendant).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

EDGINGTON, BISHOP AND WITHY v. SWINDON BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Finlay, L.J., sitting as an additional judge),
October 19, 20, 1938.]

Public Authorities—Statutory powers—Permissive powers—Erection of bus-shelter—Interference with access to private premises—Authority acting reasonably—Swindon Corporation Act, 1926 (c. xciii), ss. 21, 25.

The plaintiffs were the freeholder and leaseholders of two houses and a piece of vacant land between the two houses. Both the houses and the land abutted on the public highway, and immediately in front of the piece of vacant land the Swindon Corporation had erected a shelter for the use of persons intending to travel by buses owned by the corporation and by omnibus companies. The shelter had been erected in pursuance of statutory powers, which were general powers to erect such shelters on the public streets. The private Act giving these powers included an express prohibition of the erection of such shelters in places where there would be interference with the access to the property of the Great Western Railway Co. without the consent of that company. Upon the facts, it was held that the erection of the shelter was an interference with the rights of the plaintiffs, but that the corporation had acted reasonably:—

HELD: although the corporation was not bound by the Act to erect the shelter in a specific place, it was authorised by the Act to do something which the legislature must have contemplated would be an interference with private rights, and, as it had acted reasonably in choosing the site of the shelter, the plaintiffs were not entitled to damages for interference.

[EDITORIAL NOTE.] It has sometimes been said that, where there is no provision for compensation, then the presumption must be that there is to be no interference with private rights. The leading authorities are here reviewed, and it is shown that that is not the legal position. The matter is one of construction of the Act under which the works are done, and, where the works are not specifically described in the Act, but there is a mere general authority to construct them, then it is sufficient that, in choosing the site and in erecting the works, the authority has acted reasonably. The general test of acting reasonably is that the authority shall consider alternative sites and carefully weigh the advantages and objections put forward in reference to the sites and the works generally. A

AS TO PERMISSIVE AUTHORITY, see HALSBURY, *Hailsham* Edn., Vol. 26, pp. 259, 260, para. 573; and FOR CASES, see DIGEST, Vol. 38, pp. 21-31, Nos. 112-175.] B

Cases referred to:

- (1) *Marshall v. Blackpool Corpn.*, [1935] A.C. 16; Digest Supp.; 103 L.J.K.B. 566; 151 L.T. 286.
- (2) *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch.D. 449; 26 Digest 310, 427; 50 L.J.Ch. 81; 44 L.T. 229.
- (3) *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; 13 Digest 401, 1230; 50 L.J.Q.B. 353; 44 L.T. 653.
- (4) *London, Brighton & South Coast Ry. Co. v. Truman* (1885), 11 App. Cas. 45; 36 Digest 221, 626; 55 L.J.Ch. 354; 54 L.T. 250; *revsq.* 29 Ch.D. 89.
- (5) *Goldberg & Son, Ltd. v. Liverpool Corpn.* (1900), 82 L.T. 362; 26 Digest 445, 1624.
- (6) *East Fremantle Corpn. v. Annois*, [1902] A.C. 213; 13 Digest 401, 1236; 71 L.J.P.C. 39; 85 L.T. 732. C

ACTION for damages for interference with the right of access to premises by the erection by the local authority of a bus shelter. The facts are fully stated in the judgment. D

E. Terrell for the plaintiffs.

R. M. Montgomery, K.C., and *W. E. P. Done* for the defendants.

Terrell: The council has no right under the Act to do the acts of which complaint is made. The erection of this shelter will do serious damage to the plaintiffs. The power given by this private Act is only permissive. There is no element of compulsion in the Act. Sect. 16, which gives power to run the buses, and acquire land, expressly forbids anything that may be a nuisance. This shows that the legislature had no intention that the defendants should have power to interfere with private rights. If the Act had meant to give such power, there would have been provision for compensation. In particular, the place where the permitted shelters shall be erected is indicated. The council, if they put them up, must do so in situations where they do not seriously interfere with the rights of owners of property. Again, the dimensions of the shelters are not indicated, and there are no provisions as to the limits of the interference with private rights, as there would be if such interference were contemplated. *Vernon v. St. James, Westminster, Vestry* (2), *per* JAMES, L.J., at p. 466, lays down that to justify interference there must be express words, or necessary implication. Sect. 21 allows the interference with the public use of the street, and nothing else. E

[Counsel referred to *Metropolitan Asylum District v. Hill* (3), and *London, Brighton & South Coast Ry. Co. v. Truman* (4), per the EARL OF HALSBURY, L.C., at p. 53. Sect. 25 is merely a precautionary section inserted *ex abundante cautela*.]

Montgomery : Sect. 25 gives express protection to the railway property.

A It follows that other people's property has no such special protection. *Goldberg's* case (5) shows that, even where there is no provision for compensation, interference with private rights may be authorised by statute.

B FINLAY, L.J. : This action, in which I have been much assisted by counsel, raises a question which is not entirely free from difficulty. It is an action brought by three people who are the freeholder and leaseholders of two houses, Nos. 34 and 36, Regent Circus, in Swindon. The substance of the claim is that there has been an interference with
C their rights by the erection of an omnibus shelter by the defendants, who are the Corporation of Swindon. Regent Circus appears to be what is called in modern language a sort of centre, or focal point, in the borough of Swindon. There a very large number of omnibus lines have their termini, omnibus lines not only of omnibuses belonging to the borough
D of Swindon, and I suppose going to various points in Swindon and its immediate neighbourhood, but also of omnibuses going over a wide range of country in the west of England, belonging mainly, although not exclusively, to a Bristol company. The square is, I am satisfied, as things now are, a very important square. The two houses are rather old
E houses. One, at all events, and I dare say both of them, were originally used as dwelling-houses, but for a good many years they have ceased to be used as dwelling-houses, and are now used as offices. One of the two houses is now used as an office by a firm of auctioneers. The other of them is let, I think, to the Corporation of Swindon, who at one time
F used it as an office, but now, apparently, although the lease still subsists, the house is empty. Between the two houses there is a piece of vacant land.

The Corporation of Swindon have a private Act of Parliament, and on the proper construction of that Act this matter mainly, though not
G exclusively, depends. This is the Swindon Corporation Act, 1926, and the relevant part of the Act is Part III, headed "Omnibuses and Tramways." Sect. 16 gives the corporation power to provide and to run omnibuses within the borough. Sect. 21 is the most important, and is in these terms :

H The corporation may erect and maintain shelters or waiting-rooms for the accommodation of passengers on the corporation tramways and on the omnibuses of the corporation and may use for that purpose portions of the public streets or roads. Sect. 32 (tramway waiting-rooms) of the Act of 1904 is hereby repealed.

As I am dealing with the Act, I may also read sect. 25, because it certainly has a material bearing on the matter in hand :

The corporation shall not under the powers of the sections of this Act of which

the marginal notes respectively are "Shelters or waiting-rooms," "Cloak-rooms, &c.," and "Stopping and starting places" (except with the consent in writing of the Great Western Railway Company under the hand of their secretary or general manager) erect, maintain or provide any shelter waiting-room cloak-room room or shed or appoint any starting or stopping station or place so as to cause interference with or render less convenient the access to or exit from any station, depot or property belonging to the Great Western Railway Co., nor without the like consent shall any such cloak-room, room or shed be erected, maintained or provided on any bridge carrying any street or road over the railways of the Great Western Railway Co. or on the approaches to any such bridge. A

The point in the main turns upon the proper construction of sect. 21. It might be convenient before I deal with that—which, to my mind, is the real point in this case—to say a word quite shortly with reference to the evidence in the case. The erection which has been put up is opposite what is at the present moment an open space between these two houses. I am satisfied upon the evidence that, as things are at present, practically no injury is done to the plaintiffs. I am also satisfied, however, that the erection of this omnibus shelter where it was erected was, to some extent, an interference with a private right—namely, the right of access—because it is well-established that the right of any frontager on a road is to have access from every point of his property to the public street. Many authorities might be cited for that. One is probably sufficient. It is very clearly laid down in the opinion of LORD ATKIN in a very recent case, to which Mr. Montgomery called my attention, *Marshall v. Blackpool Corpn.* (1), at p. 22 : B C D

The owner of land adjoining a highway has a right of access to the highway from any part of his premises.

All I desire to say about that particular aspect of the matter is that I do not doubt that there was here an interference with the right of access. I have also formed the view on the evidence that, though the damage, as things are at present, is very slight, there is some injury, because one can imagine future developments of the property which might result in this shelter becoming rather a serious injury to the plaintiffs. That is all that I need say about that particular aspect of the matter. E F

With regard to the question of reasonableness or unreasonableness, I think that it is well settled—indeed, it was not questioned before me—that, assuming the corporation have a right to do this at all, they must act reasonably. It is not for this court to say what the corporation, or the committee of the corporation, have to do, but it would be for me to say, if I were satisfied that it was so, that the corporation had acted unreasonably. Upon that, I have heard the evidence, which did not appear to me to be very greatly in dispute, and with regard to that I find that the corporation did act reasonably. Although it is not really necessary that I should go so far, I think that this was probably the best available site for this shelter. I am satisfied that one or two alternative sites which were suggested had grave disadvantages, and I have no hesitation in holding that the corporation, in erecting the shelter at the point at which they did erect it, behaved in a perfectly reason- G H

able manner. One site was suggested, at a point a few yards from its present position, where very recently there has been made a rather curious jutting-out of the road. I am satisfied that that would not have been a suitable place. Another place suggested was on the other side of this square, opposite the electricity showrooms of the corporation. It appears to me, on the evidence, that that would have involved a complete reconstruction of the whole system, and an interference with a practice which has apparently long prevailed, not only as to corporation buses, but also as to the buses of an important outside company, which have been accustomed to stop at the point on the other side of the square. I do not think that it can be doubted that, from that point of view, this place was a reasonable place on which to put a shelter.

That brings me to what, to my mind, is the real point in the case, and a point upon which I have had the citation of a good many authorities, with some of which I am very familiar, and, since the subject is not an easy one, it is not altogether easy to reconcile the authorities. I do not propose to go right through the cases. I have had cited to me *Vernon v. St. James, Westminster, Vestry* (2). Then a year later there was what has always been regarded as a very leading case on this subject, *Metropolitan Asylum District v. Hill* (3). Then there was *London, Brighton & South Coast Ry. Co. v. Truman* (4), an important case in which the true limits of the decision in *Metropolitan Asylum District v. Hill* (3) were pointed out, particularly by LORD BLACKBURN, who was a party to the former decision. Then another case was cited to me which is also an important case, *Goldberg & Son, Ltd. v. Liverpool Corpn.* (5). Lastly, I ought to refer to a case in the Privy Council, *East Fremantle Corpn. v. Annois* (6), where these matters are discussed with some fulness in the decision of the Board, which was delivered by LORD MACNAGHTEN.

As a result of a survey of these authorities, the question seems to me to come down to a question of the construction of the particular section in the particular Act. One has to look at the section and to say, on the construction of it, whether or not by express terms or necessary implication it authorises the interference with a private right. That there has been interference with a private right here I entertain no doubt whatever. Indeed, Mr. Montgomery was not concerned to argue to the contrary, and the question is, on the construction of this Act, whether the interference which there was with the private right was authorised by the Act. It would not, I think, be useful for me to go through the numerous authorities. That appears to me to be the result.

Mr. Terrell, who argued the case so well for the plaintiffs, took a number of points. I am not going right through them, although I may say that I have considered them all, but there was one point which he took which, if he could have made it out, would have been in the highest degree important. He pointed out, and rightly pointed out, that there was here no provision for compensation. He pointed out that, in the leading case of *Metropolitan Asylum District v. Hill* (3), it was pointed out, in a

well-known passage by LORD BLACKBURN, that, though, of course, not decisive, that was an important element for consideration. If it could be established that the view of the courts has been that, where there is no provision for compensation, then the presumption must be that there is to be no interference with private rights, that would, I think, carry Mr. Terrell a very long way, probably the whole way. However, when the authorities are looked at, it is apparent that that is not the legal position, for, in a case to which I attach importance, *Goldberg & Son, Ltd. v. Liverpool Corpn.* (5), it is quite plain that there was no provision for compensation, and that case, to my mind, when properly understood, is extremely like the present case. My attention has been called to the judgment of SIR FRANCIS JEUNE, in the Court of Appeal, and I think that when that is looked at, the case is seen to be extremely close to the present. In that case, there was a question of the erection of a pole in connection with the electrifying of the tramway system in the city of Liverpool. It is not suggested that the legislature had authorised the erection of a pole at the point where it was erected, but it had authorised, in the street where the house in question was, the making of an electric tramway. In those circumstances, it was held that, though there was an interference with the private right, there was no remedy, and no compensation. In the same way, when *London, Brighton & South Coast Ry. Co. v. Truman* (4) is looked at, the same thing is true. There was an interference, and no provision was made for compensation, but it was held that the interference was authorised. The same thing appears to be true with regard to *East Fremantle Corpn. v. Annois* (6).

I think that one has really to look at sect. 21, and also (though I do not wish to attach undue weight to it) at sect. 25. It has often been pointed out that sections such as sect. 25, in private Acts of Parliament, are frequently put in *ex abundante cautela*, and anybody who knows how these things are done knows that probably sect. 25 was inserted because the Great Western Railway Co. were naturally desirous that their position in Swindon should be protected in every possible way. This is an Act of Parliament, however, and, if one looks at sect. 25, it is true to say that the legislature had in mind the circumstance that sect. 21 might interfere with private rights because that section says :

... so as to cause interference with or render less convenient the access to or exit from any station, depot or property belonging to the Great Western Railway Co. . . .

I repeat that I do not wish to attach undue weight to that, but I agree with Mr. Montgomery that it is something to be considered, and to be considered rather, as he put it, from the point of view that it shows that there was before the legislating authority the suggestion, at all events, that sect. 21 might authorise the interference with private rights.

From that I come to sect. 21, and I think that one ought to consider in the light of one's general knowledge what really is authorised to be done here. What is authorised to be done is the erection and mainten-

ance of shelters or waiting-rooms for the accommodation of passengers, and for that purpose the corporation is authorised to use a portion of the public streets or roads. I suppose that it is possible to imagine a case of a very broad pavement where a shelter might be erected without any interference with the right of property—without any interference, that is, with the right of access of the frontager—but I am bound to say that, for myself, I think that it is extremely unlikely. I think that, where the legislature contemplates that a number of shelters may be erected—in fact, I was told that five shelters had been erected under this power in Swindon—the legislature must have contemplated that it was at the very least probable that the erection of these shelters would interfere with the rights of frontagers, with the right of private property. Looked at from that point of view, I think that the case is like the case which I have already indicated and to which I attach much weight, *Goldberg & Son, Ltd. v. Liverpool Corpn.* (5). There I suppose that the legislature must have contemplated that the erection, at various points, of these poles and other paraphernalia of the electrified tramway would, or might, interfere with the rights of private property. I should think that it is an even stronger supposition that the erection of these shelters would be likely to interfere with the rights of private property.

I therefore cannot resist the conclusion that here the true view is that Parliament has thought fit to authorise the corporation to do a thing which at the least might—and I would go further and say almost certainly would—interfere with the rights of private property. If that is right, it seems to me that the case is at an end. One cannot go into questions of degree. The interference may be very slight, the interference may be more serious. These matters are for the consideration of the corporation, subject, of course, to the proviso, which is very important, that, if the corporation acted unreasonably—and I should think that they would act unreasonably if, having a choice of equally available sites, they chose to put their shelter on a site which would do really serious damage to property—the court would, of course, intervene. However, subject to that, the decision, if I am right on the construction of the Act, rests with the corporation.

The substance of my view can be put quite shortly by saying this. Mr. Terrell was right when he said that this was not a case of compulsion. The corporation are not bound by this Act to do a specific thing at a specific place. That is perfectly right, but I do think that it is a case where the corporation are authorised to do something which the legislature must have contemplated would be an interference with private rights. This action fails, and must be dismissed.

Judgment for the defendants, with costs.

Solicitors : *Church, Adams, Tatham & Co.*, agents for *Withy & Pooley*, Swindon (for the plaintiffs) ; *Sharpe, Pritchard & Co.*, agents for *W. H. Bentley*, Town Clerk, Swindon (for the defendants).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

SMITH v. CAWDLE FEN, ELY (CAMBRIDGE),
COMMISSIONERS.

[KING'S BENCH DIVISION (du Parcq, J.), July 20, 21, 22, October 19, 1938.]

Public Authorities—Statutory powers—Discretionary powers—Liability for non-feasance—Land drainage. A

The plaintiff's lands were in 1937 severely damaged by reason of floods. It was alleged that the damage was due to the failure of the defendants to keep in good repair the drainage works within their area. The main and substantial cause of the flooding was that a bank was too low. It was found that the dykes were kept reasonably clean and that the pumping system was as efficient as the defendants could make it, having regard to the funds at their disposal. The statutes from which the defendants derived their powers, while they gave them power to do work for the draining of the fens, did not direct or require them to do such work :—

HELD : the action failed *in limine*, because the defendants were not under a statutory duty to execute the repairs which, it was alleged, they had failed to execute. C

[EDITORIAL NOTE.] Before an authority can be made liable for the failure to execute any works or repairs, it must be shown, not only that they were authorised by the relevant statute to do those works or repairs, but also that there was a duty upon them to do them. They would, of course, be liable if they had, although not under a duty, executed the work negligently, but there is no negligence in such a case if they abstain from doing the works. The position where the statute is permissive, and not mandatory, may, perhaps, be described as that of the authority having an option to do or not to do the works. D

AS TO DISCRETIONARY POWERS OF PUBLIC AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 262, 263, para. 575 ; and FOR CASES, see DIGEST, Vol. 38, pp. 32-38, Nos. 192-224.] E

Cases referred to :

- (1) *Boynton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K.B. 213 ; 41 Digest 57, 412 ; 90 L.J.K.B. 75 ; 124 L.T. 54.
- (2) *Gilbert v. Trinity House Corpn.* (1886), 17 Q.B.D. 795 ; 41 Digest 955, 8500 ; 56 L.J.Q.B. 85. F
- (3) *Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430 ; 13 Digest 399, 1223.
- (4) *Sheppard v. Glossop Corpn.*, [1921] 3 K.B. 132 ; 38 Digest 34, 207 ; 90 L.J.K.B. 994 ; 125 L.T. 520.
- (5) *Collins v. Middle Level Comrs.* (1869), L.R. 4 C.P. 279 ; 44 Digest 62, 446 ; 38 L.J.C.P. 236 ; 20 L.T. 442. G

ACTION for damages for negligence. It was contended that the Cawdle Fen Commissioners were negligent in not keeping the drainage works in their area in proper repair. The defence relied upon the contention that the relevant Acts, upon their true construction, were, as to such works, purely permissive, and not mandatory, and that the commissioners had a discretion whether or not they would execute any repairs or other works. H

A. M. Wallace for the plaintiff.

Gordon Alchin for the defendants.

DU PARCQ, J.: The plaintiff in this action, Mr. William Smith, sued the commissioners of Cawdle Fen, Ely, for damages for negligence as a result of which, he said, the land which he occupied was flooded and waterlogged, and he suffered damage. There is, unfortunately, no doubt at all that he did suffer very disastrous floods in 1937. The claim is put in this way. It is said that it was the duty of the defendants, as the drainage authority under statute for Cawdle Fen, to inspect, maintain and care for all drains and drainage works within their area, and as often as necessary to clean, repair and keep the same, as necessary, in good condition, and well and sufficiently to scour out and cleanse of foreign bodies the drains, and effectually to cleanse the land situate within their area. The defendants deny that there was any such duty, and they also say that, if there was in fact such a duty, they have not been guilty of any breach of duty. In the view that I take of the case, it is not necessary, I think, to go in great detail into the facts, and I do not propose to deal fully with the provisions of the relevant statutes. They are 11 Geo. II, c. 34, 50 Geo. III, c. 128, and the Land Drainage Act, 1930. I say that I do not propose to refer to those Acts any further, and for this reason, if the Acts had been different, it might have been a very important question in this case whether the Acts empowered and authorised, or, on the other hand, directed or required, the defendant commissioners to do work for the purpose of draining the fens. No question arose about that, because Mr. Wallace, who has argued the case for the plaintiff with, if he will allow me to say so, both enthusiasm and ability, conceded that the Acts did not direct or require the defendant commissioners to do work, but merely authorised them to do work. In other words, they are not mandatory, and it is in view of that recognition—I do not say admission—of the true purport of the statutes that I have to decide, first, whether the commissioners came under any duty, because, if they did not, there is an end of the case against them. Mr. Alchin, for the defendants, argued that there was no duty, and that was one of his main points.

I can deal briefly with the matter. It is, perhaps, just as well to allude to the Land Drainage Act, 1930, s. 10, the earlier Acts, as is agreed, having left the matter so that the defendants were authorised, but not bound, to do certain things. The Act of 1930 by sect. 10 provides that, if any particular drainage board does not exercise its powers, then, subject to certain safeguards, the catchment board—which deals, of course, with a larger area—may exercise those powers. I mention that because it shows that there is some protection for the community on any view if a local drainage board—internal drainage board, to use the language in the Act—is failing or omitting to carry out the powers which it has.

In support of his contention, Mr. Wallace relied on *Boynton v. Ancholme Drainage & Navigation Comrs.* (1), and he also relied on some words of DAY, J., which are to be found in *Gilbert v. Trinity House Corpn.* (2),

at p. 799, and on somewhat similar language used in a well-known passage by LORD BLACKBURN in *Geddis v. Bann Reservoir (Proprietors)* (3), at pp. 455, 456. I need not now cite in full the language of LORD BLACKBURN and of DAY, J. I shall have to refer to it in a little more detail presently. Mr. Alchin also relied on *Boynnton v. Ancholme Drainage & Navigation Comrs.* (1), and it is therefore necessary to see what it A
decided, and what support, if any, is to be found in it for Mr. Wallace's contention. That was the case in which the commissioners were appointed for the purpose of draining certain low-lying lands, with powers of rating the owners of the lands to defray expenses. In this case, also, B
there are limited powers of rating the owners of the lands in the area, and the defendants have at their disposal an income, although a limited income, for the purpose of doing such work as they deem to be necessary. In pursuance of their powers, the commissioners in that case had opened C
an old river-bed, and many years earlier they had diverted the course of another river, and constructed a drain known as the East Drain. They had done all these things negligently, and they had not cleansed D
the East Drain, as it was called—that is to say, the drain constructed at the earlier date—thoroughly or often enough, as a result of which defaults the plaintiff's lands were flooded and he suffered damage. The action was tried before GREER, J., as he then was, at the Lincoln Assizes. GREER, J., held, as a matter of construction, that the statutes there in E
question merely conferred a discretion upon the commissioners, that it was for them to decide, on their discretion, what work they did do, and when they should do it, and that, in those circumstances, there was no duty upon the commissioners, so that the action against them failed. When the case came to the Court of Appeal, it was held that GREER, J., F
was wrong in the view he had taken as to the construction of the Acts, that they did more than confer discretion upon the commissioners, and that they were mandatory in the sense that, when the commissioners had done work, had constructed something—as, for instance, a drain—they G
were bound, in pursuance of the mandate conferred upon them by the Act, or the mandatory provisions of the Act, to take proper steps to keep in repair the work so constructed. So far, the case does not seem to give any support to Mr. Wallace's argument, and it is to be observed that, so far as the decision goes, there is nothing to suggest that, if GREER, J., as he was, had been right in the view he took as to the construction of the Acts, he would have been wrong in thinking that, in the circumstances, the action must fail, because there was no duty upon the commissioners. ATKIN, L.J., for instance, said, at pp. 234, 235 :

When the issues raised in this case have been completely examined the matter H
in controversy is reduced to a small compass. In my opinion sect. 8 of 6 Geo. IV, c. 165 [the material Act], imposes upon the commissioners an absolute obligation to maintain, repair, and keep in repair such drainage works as in the judgment of themselves and their engineer are proper and necessary for the drainage of the Ancholme Level . . . I see nothing in the statute to limit that obligation to such repairs as the commissioners and their engineer shall think fit. On this short ground I think that it follows from the findings of the learned judge that the appellants were entitled to succeed.

That is to say, if there was a duty, then the judge found negligence a breach of duty, and the action succeeded. ATKIN, L.J., appears to be of opinion, without doubt, that, if there were no obligation under the Act, there would be no duty, and the action would fail. Mr. Wallace, however, referred to some words of BANKES, L.J., at p. 230. In the
A argument in the case, reference had been made to the words of which I have spoken in the opinion of LORD BLACKBURN in *Geddis v. Bann Reservoir (Proprietors)* (3). Amongst the words LORD BLACKBURN used were these, at p. 456 :

B . . . an action does lie for doing that which the legislature has authorised, if it be done negligently.

Also, DAY, J., in a passage cited by BANKES, L.J., a little earlier in his judgment, said in *Gilbert v. Trinity House Corpn.* (2), at p. 799 :

C The law is plain that whosoever undertakes the performance of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of those duties.

As was said by BANKES, L.J., at p. 230 :

D Upon the facts as found by the learned judge there is much to be said for the view that upon these general principles the respondents could be held liable for the damage complained of by the appellants, because the reopening of the course of the Old Ancholme River was in substance the making of a new work by the respondents under the authority of Parliament, which work was negligently executed ; and with regard to the cleansing of the East Drain it was a duty undertaken by the respondents under their statutory powers, which they negligently performed. It is not necessary, however, to decide this appeal on these grounds, because I am not able to take the same view of the construction of the material sections of the statutes of 1767 and 1825 as was taken by the learned judge.

E Mr. Wallace said that that passage showed that BANKES, L.J., was, at any rate, inclined to think that, even if GREER, J., had been right in his construction of the statutes, an action might have succeeded. I am bound to say that, as I listened to the argument, that seemed to me to be a rather slender ground for Mr. Wallace's contention. Of course,
F any of us would attach the greatest importance to any observations that fell from BANKES, L.J., though those observations might be merely *obiter dicta*. Here, the *dictum* goes no further, it is to be noticed, than saying that there is much to be said for a view that the Lords Justices
G did not find it necessary further to consider, and neither of the Lords Justices, SCRUTTON or ATKIN, L.J.J., expressed any such views upon the matter, or alluded to the question, except, as I have said, inferentially, and I read their judgments (I have already alluded to what
H ATKIN, L.J., said) accepting the view that, if GREER, J., had been right in his view of the construction, the action must have failed.

I suggested in the course of the argument that really, when one
H examined Mr. Wallace's contention, it was based on a misunderstanding, or a misreading, of the words of LORD BLACKBURN and of DAY, J. It is a very dangerous thing to read what appear to be general observations out of their context. Take, for instance, the words used by DAY, J. He was dealing with a case where the Trinity House Corporation, in the course of doing work which they were undoubtedly entitled to do, had

by their servants left an iron stump sticking up in the water so that it was a danger to navigation, and the question there was whether it was an answer for them to say, when somebody's ship had been injured by reason of that fact: "We were only doing what we were authorised to do." It seems plain enough in such a case that a man cannot say: "I was doing what I was authorised to do, and, even though I did the work negligently, if you are injured by reason of what I did, you have no remedy." That, one may think, would be quite absurd. The answer is that, if you are doing what you are authorised to do, you must do it as carefully as you can, and that is what DAY, J., was saying.

Whatever doubt I may have entertained upon the question is entirely set at rest by a later case cited in the same year, as it happens, before the same court, in which both the observations of LORD BLACKBURN and the decision in *Boynnton v. Ancholme Drainage & Navigation Comrs.* (1) were considered. I refer to *Sheppard v. Glossop Corpn.* (4). That was a case in which an urban authority, who, of course, were entitled to levy rates, were authorised, but not bound, to light streets in the borough. One of the streets was, it seems, inadequately lighted. There was a lamp in the street, and, if that had been kept alight, an accident which did happen might not have happened. The lamp was allowed to go out, and it was said that, as a result of that, the plaintiff was injured. He brought an action, which, curiously enough, again came before GREER, L.J., then GREER, J., this time at Manchester. I think that the Court of Appeal felt some sympathy with GREER, J., because he knew of the decision in *Boynnton's* case (1) but had apparently not seen a report of it. I do not think that there was a report for him to see. I think that it is probable—I am not sure that this is right—that in the course of the argument he was reminded of the decision of the Court of Appeal in *Boynnton's* case (1), of which he had no adequate report—at any rate, before him. In this case, GREER, J., gave judgment for the plaintiff, and it was contended before the Court of Appeal, almost in the same words as those which were used before me by Mr. Wallace, that, assuming that the appellants were under no duty, but were merely employed to light their district, and that, if they had never lighted the street in question, the respondent—that is, the plaintiff—would have had no cause of action, yet, having taken upon themselves to light this place, they were bound to light it adequately, an attempt to apply the words which I have read from the opinion of LORD BLACKBURN in *Geddis v. Bann Reservoir (Proprietors)* (3). In the course of the argument, GREER, L.J., at p. 136, referred to *Boynnton v. Ancholme Drainage & Navigation Comrs.* (1). BANKES, L.J., whose *dictum* in the *Boynnton* case (1) was so much relied on before me, read the words of LORD BLACKBURN in the House of Lords, and then said, at p. 143:

That which the legislature has authorised in this case is the lighting of this particular district. If in lighting the district they act negligently, if for instance they should erect a lamp post and leave it unprotected in the middle of a highway or so close by the highway as to be a danger to persons passing along unless it was

properly protected, or allow their gas to escape into someone's house, those would be negligent acts in the course of doing that which the legislature has authorised. But in my opinion LORD BLACKBURN's rule is not applicable when it is left to the discretion of a local authority how long they shall keep the lamps alight in their district, whether they shall remove an existing lamp post, and whether they shall cease to supply gas to some lamps and continue to supply it to others.

After citing the words of LORD BLACKBURN, SCRUTTON, L.J., says,

A at p. 145 :

The argument, which here followed the letter rather than the spirit of that passage, was this : the appellants were doing that which the legislature authorised, namely, lighting ; they were doing that negligently when they turned out a light in a dangerous place. That argument takes LORD BLACKBURN's words as meaning, not only does an action lie for doing that which the legislature has authorised if the doing is negligent ; an action also lies for abstaining from doing that which the legislature has authorised, if the abstaining is negligent. But it is not negligent to abstain from doing a thing unless there is some duty to do it. The argument in truth assumes a duty upon the appellants to light. If there is no duty to light there is no negligence in abstaining from lighting. LORD BLACKBURN's words are addressed to negligence in the direct operation of the powers conferred and undertaken ; for instance, if the appellants chose to light by electricity and laid defective wires near to the main gas pipes in their district and so caused an explosion, that would be a negligent exercise of their powers ; or if they placed a refuge in a crowded street and omitted to light it properly, that might be doing negligently that which the legislature authorised. But it is going far beyond LORD BLACKBURN's *dictum* to say that because, when an option is given by statute to an authority to do or not to do a thing and it elects to do the thing and does it negligently, it is liable, therefore it is liable if it elects not to do the thing, which by the statute it is not bound to do at all.

D As I understand those words, what it comes to is this. If an authority is authorised to do something, it is no defence, as I have said, if somebody else is injured by the way in which it does the acts, because they have been negligently performed, to say : " I was only doing what I was entitled to do." Here, what is complained of is, in substance, a failure to do what there was power and authority to do, not by someone who says, " You did it in such a way that I was injured by your doing it," but by someone who says : " Having these powers which you were entitled to exercise for my benefit, either you have not exercised them at all or you have inadequately exercised them." It may be, for instance, that, if the authority, with the intention of clearing away water, were to use some sort of pump which, instead of clearing away water, deposited the greater part of it, because it was negligently worked or designed, on the land of one particular landowner, they would be liable, because he would be entitled to say that they had no business to use their powers in a negligent way affecting him. However, when it is said, " You did not have a sufficiently powerful pump," or when it is said, " You did not spend enough of your limited resources on repairing banks or a particular bank," when it is said, " You did not build high enough a bank which could have been built higher, and, if you had performed your powers more completely and more adequately, I should not have suffered damage," then I think that the plaintiff's case is on the wrong side of the line, and that he is really seeking to put upon the defendants a duty which the legislature does not put upon them at all.

I think that, when the matters of complaint here are examined, it is seen that the position is the same as it would have been in *Boynnton's*

case (1) if there had been no duty upon the defendants—that is to say, that the construction put by GREER, J., upon the Acts had been correct—and, although I do not pretend that *Sheppard's* case (4) is on all fours with this one, I think that a great deal of assistance is to be derived from it, and I have come to the conclusion that the argument that that duty is present here is really based on a misreading of the words of LORD BLACKBURN and of DAY, J. That being so, I am of opinion that the claim here fails *in limine*. However, I do not think that I ought to leave it there, because it may be—though I do not wish to say anything to encourage an appeal, or to discourage one, for that matter—that another view might be taken. It is perhaps desirable that I should say something more about the facts. There is some difficulty in dealing with the questions of fact, because I have to try to imagine that there is a duty, and say what that duty would be. In the case of people who were doing their best with their limited resources, in these difficult conditions, to make things as safe as possible for those in their area, subject always to certain overriding powers of other persons, it is very difficult to see how one is to express the duty under which it would be supposed that they might come. I agree with Mr. Wallace that the main and substantial cause of the flooding—the original flooding, I will call it—of the plaintiff's land was the fact that the bank near his farm buildings was too low, and had not been built up to the height to which it should have been built up to make him reasonably safe. On Mar. 12, water came over the bank at that point which is marked on the plan in red by one of the witnesses, ran round the plaintiff's buildings into the field, over the railway line, into the orchard, filled the orchard and flooded the cottage. Then, as he said, the railway employees cut ditches to let the water go, and it flowed on to his fields and flooded them. I agree with Mr. Wallace that, although there was an intervention by the railway employees, the defendants would be liable for that, assuming that they would be liable for negligence on the principle of the case he cited to me, *Collins v. Middle Level Comrs.* (5). Then, I am also quite sure that, for reasons quite outside the control of the defendants, which no reasonable care on their part on any view could have been expected to prevent, water came rushing over the banks of the River Ouse on Mar. 16. The wind was very high, and, having heard the evidence, I have no doubt that, apart from what happened on Mar. 12, as from Mar. 16, the plaintiff would have shared in a general misfortune, and his lands would have been grievously flooded by reason of the abnormal conditions of the weather and the tides on that occasion.

As to the dykes, I am not satisfied that the dykes in the power of the defendants were not reasonably cleaned up. There may be some doubt about it, but I am not satisfied that the plaintiff has discharged the burden upon him so far as they are concerned. A great deal was said about some trees lying in the water, but I do not think that they had any serious effect, and I think that they may be left out of account.

As to the pumping system, if that is a question which I ought to decide, I do not think that until Mar. 14 the pumping station was sufficient for what might normally be expected. However, I am not prepared to say that, having regard to the available funds, the defendants were to blame for not maintaining a more efficient pump. I do not know that
A there is very much importance in the question of the pumping system, except that, as Mr. Wallace put it, the water would have been cleared off more quickly by an efficient pumping system. I have no doubt that the lock-gates had got into a very dilapidated condition, and that there was some leakage through them, though it has been, I think, a little
B exaggerated, and, as to the sills and slackers, I think that is a matter as to which one might apply the maxim *de minimis*.

It comes to this, that, in my opinion, until Mar. 10 the flooding was attributable to what, I suppose, if I am wrong on the question of law, might be said to be negligence on the part of the defendants. If I had
C taken another view on the question of duty, that would raise an interesting question of damages. Mr. Wallace argued—and I think I put the point, too, in the course of the argument—that it would be no answer to a claim for damages for destroying something on Mar. 12 to say: “It would have been destroyed on Mar. 16.” I am not deciding any-
D thing now, because I did not hear any argument about that case, but I should be disposed to say—and I mention this since, if the matter is considered elsewhere, it may be just as well that I should express my view for what it is worth—that in one sense it is true to say that it is no answer. If you destroy something on one day, you are liable to pay
E damages, even though somebody else might have intended to destroy it, and it might certainly have been destroyed, a few days afterwards. At any rate, it seems to me that that fact must very much affect the *quantum* of damages, because, although I hesitate to use an expression which is a troublesome one, the expectation of life must be taken into
F account. If a man is killed by somebody’s negligence on a Monday, and it is proved to the satisfaction of the jury that he had been sentenced to death and would have been hanged on Wednesday, I think that it is absurd to suppose that his executors would recover the same damages as if he had been a person with a likelihood of long life. I had it in
G my mind, if my decision had been the other way, to suggest to counsel, although it had been agreed that the damages should be referred to an official referee, that, in the circumstances, it might have been better that I should deal with them, since they would be comparatively small.

There must be judgment for the defendants with costs.

H Solicitors: *Gibson & Weldon*, agents for *J. Hunt*, Peterborough (for the plaintiff); *Pickering, Kenyon & Co.*, agents for *Evans & Son*, Ely (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

PEOPLE'S HOSTELS, LTD. v. TURLEY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 18, 19, 1938.**]

Public Health—Common lodging-house—Registration—Letting at weekly rent in advance—Whether premises outside definition of common lodging-house—Public Health Act, 1936 (c. 49), ss. 235, 236. A

The appellants were charged with having kept a common lodging-house at certain premises without being registered as the keepers thereof, contrary to the provisions of the Public Health Act, 1936, s. 236. The premises, which had for 59 years been registered with the local authority as a common lodging-house, provided accommodation by night for 201 poor persons. Until the end of 1937 each person using the premises paid 10d. a night, and on Jan. 21, 1938, the charge was altered to 5s. 6d. per week. The appellants contended that the change to the system of minimum weekly contracts, with payment in advance, took the premises outside the definition of a common lodging-house in the Act of 1936. The respondent contended that the period of letting was unimportant, as there was no mention of any period of letting in the definition of a "common lodging-house" in sect. 235 of the Act of 1936, and that it was sufficient to have proved that the premises were used and provided for the purpose of accommodating by night poor persons who resorted thereto and were allowed to occupy one common room for the purpose of sleeping or eating. The justices convicted the appellants, and thereupon this appeal was brought:— B

HELD: as the definitions of a common lodging-house and of the character which it must exhibit were now to be found only in the definition in sect. 235 of the Act of 1936, the justices were right in convicting upon the facts before them. C

[EDITORIAL NOTE.] A common lodging-house is defined by statute as one for the accommodation by night of poor persons, not being members of the same family, who resort to it and are allowed to occupy one common room for the purpose of sleeping or eating. It is here sought to be shown that a letting for a week, the rent being paid in advance, is sufficient to place a house outside the definition. The definition, it will be noted, makes no reference whatever to the terms of letting or to the manner of payment, and it is therefore held that, if premises are otherwise within the definition, they are not excluded therefrom by the special terms of the letting. D

AS TO COMMON LODGING-HOUSES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 358-363, paras. 705-726; and FOR CASES, see DIGEST, Vol. 38, pp. 210, 211, Nos. 440-466.] E

Cases referred to: F

- (1) *Parker v. Talbot*, [1905] 2 Ch. 643; 38 Digest 210, 441; 75 L.J.Ch. 8; 93 L.T. 522. G
- (2) *London County Council v. Hankins*, [1914] 1 K.B. 490; 38 Digest 210, 442; 83 L.J.K.B. 460; 110 L.T. 389.
- (3) *Logsdon v. Booth*, [1900] 1 Q.B. 401; 38 Digest 210, 449; 69 L.J.Q.B. 131; 81 L.T. 602. H
- (4) *Logsdon v. Trotter*, [1900] 1 Q.B. 617; 38 Digest 211, 451; 69 L.J.Q.B. 312; 82 L.T. 151.
- (5) *Daley v. Lees*, [1926] 1 K.B. 40; 38 Digest 210, 443; 95 L.J.K.B. 75; 134 L.T. 78.

APPEAL by way of case stated against a decision of the justices for

the city of Birmingham. The facts and the arguments are fully set out in the judgments.

P. E. Sandlands, K.C., and *M. Dunbar Van Oss* for the appellants.

G. R. Blanco White, K.C., and *D. L. Finnmere* for the respondent.

A LORD HEWART, L.C.J. : This is a case stated by justices for the city of Birmingham. The question arose in the following way. An information was preferred by the present respondent, Albert William Turley, the chief sanitary inspector for the city of Birmingham, against the present appellants, People's Hostels, Ltd., for that the appellants
B on a certain day and other dates earlier than that day did keep a common lodging-house at certain premises, not being registered as the keepers thereof, contrary to the provisions of the Public Health Act, 1936, s. 236. The justices, having heard the evidence, convicted the appellants and imposed a fine. The question raised by this case is whether the justices
C came to a correct determination in point of law.

In the course which the argument has followed, it has been made plain that there was really only one question in issue between the parties. It appears from the statement of the facts that on Jan. 21, 1938, a deputy
D keeper of the lodging-house in question informed an officer of the local authority that the charge—that is, the charge made to persons who came to use the accommodation of the lodging-house—had been altered to 5s. 6d. a week, and the deputy keeper gave to that officer a notice in the following terms :

E People's Hostels, Ltd., 109, Rea Street. Excellent accommodation for working men. Every convenience. Cubicles. One price—5s. 6d. per week. Call and have a chat with the manager.

Before that date—Jan. 21, 1938—apparently the charge had been a few pence per night for the accommodation which was offered. From Jan. 21
F onwards, the charge came to be a charge of 5s. 6d. a week, and it was contended—and it was really the main, if not the sole, contention—on the part of the present appellants that the change to the system of minimum weekly contracts, with payment in advance, took the premises outside the term “common lodging-house” under the Act of 1936. On the
G contrary, it was contended on behalf of the sanitary inspector that the premises were a common lodging-house within the meaning of the statute, and within the terms of the definition in sect. 235 of the Act of 1936. This contention was supplemented by the contention that the period of the letting was unimportant, and that there was no mention of any period of letting in the definition of a “common lodging-house” in
H sect. 235. The justices, having the evidence and arguments before them, came to a conclusion which they have concisely expressed in these terms :

We were of opinion, on the facts proved and admitted, that these premises were a common lodging-house within the meaning of the Public Health Act, 1936, s. 235, and that they had been kept by the appellants on the dates alleged without being registered, and we accordingly convicted the appellants.

The argument in this case—an interesting argument, if I may say so—has covered a great deal of ground, and has referred at some length to the history of the litigation upon the meaning of this expression “common lodging-house.” The argument has been strongly contended for, on behalf of the appellants, that, as the law now stands, they are weekly contracts, and, where there are such payments of 5s. 6d. a week, the premises are outside the sphere of common lodging-houses. The fact that leaps to the eye is that, after all the protracted litigation in the past, and all the ingenious arguments which went before, there was passed in 1936 a Public Health Act which, in the part of it relating to common lodging-houses, began with a definition, after which it went on to provide that no person should keep a common lodging-house unless he was registered in respect of it. Then there were elaborate provisions for the registration of common lodging-houses, provisions with respect to the details of the subject-matter of registration, provisions for the management and control of lodging-houses, the duty of the keeper, and so forth, and the power to order medical examination of inmates of common lodging-houses, and so on. No doubt, from the point of view of public health, it is an important piece of legislation. That bundle of sections had placed at the head of it, in sect. 235, a definition of the expression “common lodging-house.” The definition is in these terms : D

In this Part of this Act the expression “common lodging-house” means a house (other than a public assistance institution) provided for the purpose of accommodating by night poor persons, not being members of the same family, who resort thereto and are allowed to occupy one common room for the purpose of sleeping or eating, and includes, where part only of a house is so used, the part so used.

There is in the section no definition of the term “poor persons,” there is no definition of the meaning of the words “resort thereto,” and the section is simply and solely in the terms which I have read. The argument which is made on behalf of the appellants is that that definition does not purport to be exhaustive, and in particular that it does not purport to bring within the definition of “common lodging-house” a house where there are weekly contracts with payment in advance. In my opinion, this definition speaks, and speaks plainly, for itself, and the matter is only confused if reference is made to previous decisions, where no such definition was in view. Historically, no doubt, the meaning of the term “common lodging-house” was rendered more confused by reason of the section in the Common Lodging-houses (Ireland) Act, 1860, which did contain a definition, so far as Ireland was concerned. It was not a definition so far as England was concerned, but nevertheless there were various cases in which the expression “common lodging-house” was to some extent described, or even defined. In particular there was the well-known case of *Parker v. Talbot* (1), which was afterwards referred to, for example, in *London County Council v. Hankins* (2). In that latter case, ATKIN, J., as he then was, summarised the state of the law in this concise statement, at p. 504 : H

In my opinion the law as to the meaning of the expression “common lodging-

house" was definitely settled in *Logsdon v. Booth* (3) and *Logsdon v. Trotter* (4), in which the court adopted the definition given by the law officers. The effect of *Parker v. Talbot* (1) was not to displace that definition, but only to add to it two more terms; first it adds the term that the lodgings are to be lodgings for hire, and secondly it defines the short period mentioned in the law officers' opinion as being a single night or less than a week.

A There was afterwards in this court *Daley v. Lees* (5), where the previous decisions were reviewed.

B It was in that state of the facts, and in that state of the controversy, that the Public Health Act, 1936, was enacted, and it is perfectly manifest, when one looks at the statute, that the definition of "common lodging-house" has nothing whatever to say on the topic of the term for which the lodgings are to be hired, whether they are to be hired for a single night or for less than the week. The definition ignores all the arguments which had been made on that head, and provides that a common lodging-house is a house ". . . for the purpose of accommodating by night"—not "by the night," nor "per night," but "by night"—"poor persons, not being members of the same family, who resort thereto and are allowed to occupy one common room for the purpose of sleeping or eating. . . ."

C I cannot accept the suggestion, if it is seriously made in view of the antecedent litigation, that it was *per incuriam* that the legislature omitted to deal with the topic of the letting period, the duration of the period of hire. In my opinion, having regard to the controversy which had gone on for so long a time, and which had had such curious and interesting incidents as those which arose about the Irish Act and the mention of the Irish Act in the Court of Appeal, it is inconceivable that this section was framed in the way in which it is framed without deliberate intention on the part of the legislature. In other words, whatever force there was in the contention that a common lodging-house must be a place where the period of letting was for a single night or less than a week, it disappears, and the test of "common lodging-house"—the nature of the characteristics which they must exhibit—is to be found, and found alone, in this definition in sect. 235. Taking that view, I am of the opinion that the appellants here fail, and that there is no ground any longer for the contention, unsuccessfully raised in the court below and ingeniously persisted in here, that the change to weekly contracts, with payments in advance; took the premises outside the sphere of common lodging-houses. I think, therefore, that this appeal fails, and ought to be dismissed.

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H CHARLES, J. : I agree, and, agreeing with everything that has fallen from LORD HEWART, L.C.J., in the course of his judgment, I should hesitate, were it not for the fact that a matter of public importance is involved in this appeal, to add anything myself. I propose, however, to indicate shortly the views that I have formed after hearing argument upon the appeal, in order that I may make plain how the matter presents itself to me in deciding in agreement with LORD HEWART, L.C.J. It is important to see what the information exactly was. The information

was that the appellants on Feb. 15, not being registered, did keep a common lodging-house at the premises, No. 109, Rea Street, contrary to the provisions of the Public Health Act, 1936, s. 236. Therefore, the real matter to be considered, and the only matter to be considered, is what sect. 236 of the Public Health Act really means. I venture to think that, having regard to the past history of common lodging-houses, the meaning of the section and of the definition section which precedes it, sect. 235, becomes perfectly clear. It is significant that, ever since 1851, when the Common Lodging houses Act was passed, and from 1853, when a statute of like title was passed, right through to 1875, when the Public Health Act was passed, there was no statutory definition of what a common lodging-house really was, but in 1860 there was an Act passed—expressed, it is true, by sect. 10 of that Act, the Common Lodging-houses (Ireland) Act, 1860, to extend to Ireland only—which did give a definition of a common lodging-house, and that definition was :

The term "common lodging house" shall mean a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week.

Therefore, that definition made the length of the letting of vital importance. In 1905, when the matter came before the Court of Appeal in *Parker v. Talbot* (1), the Court of Appeal considered that they ought, as it were, to link up the definition in the Irish Act with the English Acts, and in a measure to incorporate that definition in the English Acts which had preceded 1905. They proceeded so to do, and they accepted the definition of a common lodging-house in the Irish Act as applying in England to the English Acts as well. If in the Acts antecedent to 1936 there had been a statutory definition of a common lodging-house in England, and if that statutory definition was altered by the Act of 1936, it could scarcely be contended that the Act of 1936 did not override in its definition the definitions in the Acts which had been passed at a time antecedent to that Act. However, as I have indicated, there was no such statutory definition, and all we can find is the definition incorporated by the Court of Appeal from the Irish Act in the case I have mentioned, *Parker v. Talbot* (1). It is perfectly true that it has been said, and said more than once, that, when one is dealing with a matter which affects private rights which previously existed, the section ought to be clear and unambiguous if it is to be said to alter the existing law. That is quite clear, but, when we come to the Act itself, let us see whether it does not alter the existing law. For the first time, we get a statutory definition. It is a definition, for it says :

... the expression "common lodging house" means a house ... provided for the purpose of accommodating by night poor persons, not being members of the same family, who resort thereto and are allowed to occupy one common room for the purpose of sleeping or eating. ...

It is to be observed, to begin with, that no period of letting is noticed at all as of importance, or as in any way vital to the consideration as to whether

or not a particular lodging-house is a common lodging-house in law, and one may well suppose, having regard to all the previous litigation, to which LORD HEWART, L.C.J., has referred, and which has gone on in years past as to common lodging-houses, that, if the legislature, once it came to make a definition, had intended that the period of letting should have anything to do with the matter, then it would have been included in the definition. It is not included, and one is quite entitled to suppose that it was not included for a very good and proper reason. Then it is said that it is provided for the purpose of accommodating by night poor persons, and it is said that that really enures in favour of the appellants, because that means by a single night, so that it is indeed more closely defined than it was before, when it might go to any period inside a week. There is nothing exclusive in those words that I am able to see. This house in question does accommodate by night poor persons, and, indeed, until the notice to which LORD HEWART, L.C.J., has referred, which was given either on Jan. 10 or on Jan. 21, it was undoubtedly a common lodging-house, where a man paid so much a night to go in. However, assuming, as those who drafted this notice must have assumed, that, if the letting could be made one for a whole week, automatically the premises would be excluded from the operation of the law as to registration; for then they could say: "Now we are not accommodating by night poor persons. We are letting accommodation by the week to poor persons."

The respondent contends that the period of letting is unimportant, and there was no mention of any period of letting in the definition of "common lodging-house" in sect. 235 of the 1936 Act. It had been shown, as we see from the case, that the premises were used and provided for the purpose of accommodating by night poor persons who resorted thereto, perhaps not exclusively by night—that does not matter, the definition does not say, "exclusively by night"—who "are allowed to occupy one common room for the purpose of sleeping or eating," as indeed in this case, too, they were so allowed. That being so, it appears to me that the justices were quite right. Upon the case presented to us, it is quite clear that the house in question, which has been the subject of this litigation, was a common lodging-house within the meaning attributed to a common lodging-house by the Public Health Act, 1936, s. 235, and therefore it required registration. I agree that the appeal fails.

MACNAGHTEN, J. : I am of the same opinion, and there is very little I wish to add. The Public Health Act, 1875, contained provisions for the registration and regulation of common lodging-houses, but did not contain any definition of a common lodging-house. Accordingly, the court was called upon to say what that word in that Act, and in the earlier Acts which preceded it, meant. The decision of the Court of Appeal in *Parker v. Talbot* (1) decided that one of the things necessary

to bring a house within the meaning of the words as used in the Act was that the accommodation provided in the house should be for a period of a single night or less than a week. If the accommodation was provided for a longer period than that, then the house was not a common lodging-house within the meaning of the Act. In 1936, the legislature repealed those provisions of the Public Health Act, 1875, and on this occasion they thought fit to give a definition of a common lodging-house in which the qualification which the Court of Appeal had laid down is omitted. If that qualification had been stated in the Act of 1875, having regard to the fact that the present Act repeals that Act, it would be impossible to argue that the provision in the Act of 1875 was still in force. It appears to me to be beyond all possibility of argument that, where a qualification is not stated in the Act, but only comes into being by a decision of the court, it necessarily follows that that qualification is repealed. I agree that the appeal in this case must fail.

Appeal dismissed with costs.

Solicitors: *Marston & Robinson* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Sir Frank Wiltshire*, Town Clerk, Birmingham (for the respondent).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

DARTFORD BREWERY CO., LTD. v. FREEMAN.

[KING'S BENCH DIVISION (du Parcq, J.), **October 13, 14, 1938.**]

Landlord and Tenant—Compensation for loss of goodwill—Licensed premises—Right to new lease—Attracting particular classes of customers to the premises—Landlord and Tenant Act, 1927 (c. 36), ss. 4(1), 5(1).

Upon a claim under the Landlord and Tenant Act, 1927, for compensation for loss of goodwill in respect of licensed premises, it was proved that the tenant had increased the trade of the house by inducing a number of clubs to meet upon the premises, had worked up a considerable dining-room trade, but that during the time immediately before the determination of the lease the business had not progressed as rapidly as other neighbouring houses. It was also shown that there was a considerable body of custom created by him which was so personal to him that it attached to him, and not to the premises:—

HELD: (i) the club trade and the dining-room trade were properly taken into consideration in assessing the compensation for loss of goodwill.

(ii) the comparison with other neighbouring houses did not bar a right to compensation, so long as it was shown that the applicant and his predecessors had made some relevant addition to the value of the premises.

(iii) as the personal goodwill could not be made the subject of compensation under the Act, this was a case in which a new lease ought to be granted.

[EDITORIAL NOTE.] The decision in this case does not carry the legal position any further, and that position remains as stated by the House of Lords in *Charrington & Co., Ltd. v. Simpson* (1). The judgment herein, however, does consider the application of the principles laid down by the House of Lords to the particular case of licensed premises, and anyone who has to deal with the problems thus arising will find the judgment herein an extremely valuable guide.

A AS TO COMPENSATION FOR GOODWILL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 294-301, paras. 333-345; and FOR CASES, see DIGEST, Supp., Landlord and Tenant, Nos. 2306a-2306r.]

Cases referred to :

- B (1) *Charrington & Co., Ltd. v. Simpson*, [1935] A.C. 325; Digest Supp.; 104 L.J.K.B. 226; 152 L.T. 469; *affg.*, [1934] 1 K.B. 64.
 (2) *Whiteman Smith Motor Co., Ltd. v. Chaplin*, [1934] 2 K.B. 35; Digest Supp.; 103 L.J.K.B. 328; 150 L.T. 354.

C APPLICATION under R.S.C., Ord. 53D, r. 17, for the adoption by the court of the report of one of the panel of referees under the Landlord and Tenant Act, 1927. In the reference under the Act, the applicant, William Arthur Freeman, had claimed that he was entitled to be granted a new lease of the licensed premises known as the Crooked Billet Hotel, High Street, Penge, because the goodwill that had become attached to the premises by reason of the carrying on by him of the business of
 D licensee for a period of more than five years was such that the sum which could be awarded him under sect. 4 of the Act would not compensate him for the loss of such goodwill which he would suffer upon removal to other premises. The Crooked Billet Hotel was let for a period of thirty years by a lease dated June 28, 1895, and there had been granted
 E a further reversionary lease for a term of thirteen years on June 24, 1925. These leases would, therefore, terminate on June 24, 1938, by effluxion of time. The rent under these leases was £100 per annum up to 1925, when it was increased to £220 per annum by reason of certain alterations then executed. In addition, a premium of £1,000 had been
 F paid. The applicant had entered into occupation of the premises in 1930, the lease being assigned to him as the beneficiary under the will of the previous tenant. It was contended before the referee that the increase in the goodwill attached to the premises was not due to the carrying on of the business by the applicant or his predecessors in title.
 G It was stated to be due (a) to the fact that the premises were licensed premises, and (b) to the improved shopping facilities and transport services, and the development of the district generally. The applicant and his predecessors had attracted to the premises a number of clubs, which met and transacted their business there and considerably increased
 H the trade of the house.

The referee found that, after consideration of all the circumstances, the applicant should be granted a new lease for a term of ten years, determinable at the option of the tenant at the end of the seventh year, at a rent of £400 per annum, and that the tie and other covenants should be the same as in the present lease.

This application was before the court on Mar. 29, 1938, when certain objections to the form of the report of the referee were dealt with and the report was remitted for amendment. These proceedings are reported [1938] 3 All E.R. 120.

R. M. Wilson for the applicant.

R. C. Vaughan for the respondent.

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DU PARCQ, J.: In this case, I think that it is not necessary that I should give a long judgment, nor do I intend to say anything about the law, except that I think that, for the purposes of this case, it is sufficiently stated already in the opinions of their Lordships in the House of Lords in *Charrington & Co., Ltd. v. Simpson* (1), and in *Whiteman Smith Motor Co., Ltd. v. Chaplin* (2). I have been particularly referred to certain passages in the judgment of MAUGHAM, L.J., as he then was, in that case. Earlier in the course of this case, I have had my attention drawn also to the judgment of SCRUTTON, L.J.

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The referee has provided me with a statement of the reasons which led him to report as he originally did. I do not propose to repeat what I said before as to the duty of the referee in this case. I may add that there is in MERLIN'S LANDLORD AND TENANT ACT, 1927, what purports to be a model specimen of a referee's report, and, although I do not pretend to have read every word of it, it appears to me to be an excellent model for others to follow. The last thing that a referee ought to do is to present the tribunal which has to make the ultimate decision with a series of findings of fact involving consideration of a great deal of evidence, and subsidiary findings of a number of facts without any indication as to how he arrived at those ultimate findings. It is important that the tribunal should be given the fullest opportunity of revising the findings of the referee, and that the report should be so framed that that revision is made easy, and that it is not made necessary for the court to re-try the case. I think that a court, in dealing with a matter of this kind, is anxious to uphold the findings of a referee, which follow on a long investigation of questions of fact, in the sense that the court will not willingly upset them or take a different view unless it is made clear either that the referee made some mistake of law, or that there was no evidence to support his finding, or that it is manifest that he took a view of the evidence which the court is able to say—remembering always that the judge has not the advantage which the referee enjoyed of seeing and hearing the witnesses—is a view which cannot be considered reasonable or right.

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I have come to the conclusion in this case, subject to one minor qualification, that I ought to accept the findings of the referee. No doubt there are matters in the report which may be criticised, and it may be that, if I were to give a detailed judgment, I should not express myself in the same way on all matters, but I have listened to a very careful and detailed examination of the report, with references to the

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evidence, by counsel for the landlords here, and, having heard it, I am satisfied that, looking at the substance of the thing, the referee has come to a proper conclusion, and that he has not been led to form the view which he has formed either by any mistaken view of the law or by any wrong view of the evidence.

- A I will deal a little more in detail with some of the objections taken. We are dealing here with licensed premises at Penge. The history, so far as I am concerned, goes back to 1895, when a lease was granted of this public-house, the Crooked Billet. There was an assignment, and there was a reversionary lease from 1925 to 1938. All that time, or, at any
- B rate, since the lessee under the original lease assigned his interest to Mr. Jennings in 1898, the business has been carried on by one family, and I think that there is no doubt that it has been a successful business. In later years, there has been more competition, apparently, and it is quite true that the business has not made the same strides as those which
- C some of the others in the neighbourhood have made. It has had setbacks. It certainly is not doing so well as it has done at some times in its history, as everybody who knows anything about the vicissitudes of this trade would expect, but all along a substantial business has been done, and some profit has always been made.
- D The lease having come to an end, the referee had to consider, and I have to consider, whether the tenant was entitled to compensation under the Act of 1927, and, if so, whether he ought, as he desires, to be granted a new tenancy. The question whether he is entitled to be paid compensation depends on the further question whether he has proved to the
- E satisfaction of this court :

... that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto.

- F It is necessary also to bear in mind the proviso :

... (c) in the case of licensed premises the sum payable as compensation for goodwill under this section shall not include any addition to the value of the premises attributable to the fact that the premises are licensed premises.

- With regard to that proviso, it is plain that it does not operate to prevent
- G a tenant of licensed premises from ever recovering compensation for goodwill. That is made clear by the decision of the House of Lords to which I have referred. In the case of licensed premises, there may be compensation, but there must not be awarded for compensation a sum of which it can be said that it includes an addition to the value of the
- H premises attributable to the fact that they are licensed premises. In the case of licensed premises, as in the case of all other premises, goodwill may attach to them by reason of the carrying on of a business there by the tenant or his predecessors in title. It may be that that section would apply, although I need not consider that or decide it, to a case where, while a term is running under a tenancy, a licence was granted,

but I think that it is right also to say, for the purposes of the present case, that it operates as a warning to the tribunal not to make the mistake of giving compensation to the tenant on the footing that he has added to the value of the premises by his carrying on of the business, when in truth the addition which has come to the value of the premises is due simply to the fact that they are licensed premises and that people can get intoxicating liquors there. I say no more about that proviso except that it seems to me plain that the referee has understood it, and given effect to it. As to the section itself, it would indeed be remarkable if over this long period there were no goodwill within the meaning of that section attaching to the premises. There are some business premises where it might make very little difference who is carrying on the business. I will not attempt to specify them, but there are shops of certain kinds where I dare say the personality of the shopkeeper matters little. What does matter is the situation, and perhaps the fact that there may be some kind of monopoly. In the case of licensed premises—though, of course, there is, as the legislature has reminded one, a partial monopoly—one is still dealing with a class of business where the exertions and the abilities and the idiosyncrasies of the persons carrying on the business, as everybody knows, have a great deal to do with the type of customer and the number of customers attracted to the house. Of course, that cuts both ways. In the case of an hotel or a public-house, there will always be a great many people who go there only because it is in the hands of a particular proprietor, and would cease to go there if he left, and, if they could, would follow him. On the other hand, however, I think the experience of the world shows that there is always a substantial number of people who, having once got into the habit of going to a place, will continue to go to it, even although there is a change in the proprietorship. I speak of the tenant as being the proprietor of the business. It is to be observed that, in the case of licensed premises, where, ordinarily speaking, the tenant, if he has to leave, may find great difficulty in getting into other licensed premises in the neighbourhood, the customers who would like to follow him are unable to do so. It is not a business which can be transacted by post. It is necessary that the customers should live in the near neighbourhood of the licensed premises. If the tenant loses his lease, he loses his customers, and they are very likely to remain attached to the old premises.

Those are only general observations, but they form part of my reasons for saying that I should be very much surprised if the referee had said that there was no goodwill. The referee has found that there was, and substantially his conclusion is, when he comes to give his reasons for it, that there is a difference of £50 a year between the rent which otherwise would be obtained and the rent at which these premises can be let because of what I shall call for shortness the statutory goodwill. I say that so as to show that I mean goodwill within the terms of that section. Nobody can possibly say that any exact calculation can bring

one to that figure of £50. Of course it cannot. All sorts of criticisms can be made here and there of the conclusions at which the referee has arrived. It is inconceivable that in a case of this kind there should not be a great deal to be said on one side and the other, and, indeed, the experts have said a great deal on one side and the other. I think, if

- A I may say so with respect, that they have said a great deal too much, because it does appear to me from what I have seen of the shorthand note that all the experts indulged in a great deal of speculation, and rather gave their opinions and theories about the habits of the population and the effect of this, that and the other upon the neighbourhood and the
- B amount of drink which would be consumed, whereas in truth the referee, with his knowledge of the world, was quite as well able to come to a conclusion as were the experts. I do think that it is rather startling to find that these proceedings lasted for six days. However, I am not blaming anybody. I know the difficulty of confining evidence or argu-
- C ment to a very short space of time, and it may be that it was unavoidable.

I will say a word about some of the matters which have been raised, although perhaps not all of them. It is said that the referee has not taken a proper view of the existence of the clubs at these premises, and that there was no evidence that the existence of the clubs was due to the tenant or his predecessors in title. I think that there was. I think that it may not have been strictly admissible, if objection had been taken, but it would have been surprising, in the circumstances, when a nephew—who, at any rate, was a boy of fourteen or so when he first knew these premises—came and said, “Yes; it was my uncle who started these

- E clubs,” if serious objection had been taken to it; and it was not. There certainly was evidence that the predecessor in title of the present tenant did start the addition to the business which consisted of getting clubs to meet there. I do not think that it matters much who suggested it, or who paid for the alteration in the rooms. These clubs have been
- F attracted there, and there was evidence on which the referee could find, as he has done, that by the efforts of the tenants a new branch of the business was built up, and just the class of business which is likely to remain for the benefit of the landlord. It is certainly a very valuable thing, I should think. Although the members of the clubs may not
- G spend a great deal, as it is said that they did not, during the course of their business discussions, the fact remains that the presence of highly reputable societies would bring to the premises exactly the class of trade that public-houses aim at obtaining.

I think that some criticism may legitimately be made of what the

H referee said as to the fact that the tenant paid an increased rent in respect of the reconstruction of the premises (I think in fact it was for the construction of the dining-room), if indeed he means that the mere fact that he paid an increased rent entitles him to any compensation under this Act. As Mr. Vaughan says, it went further than that. The tenant did pay for some of the work, not in the form of rent, but in the form of

payment of part of the price payable for the work that was done. There, again, I think that the substance of the matter is that the tenants have worked up this dining-room trade, or whatever it may properly be called, and that the landlord is going to get some benefit from it.

I am not much impressed by the complaint that the referee has ignored what are called the comparative figures with regard to other neighbouring houses. It may be that in the case of the Waterman's Arms and some of those houses even more goodwill has become attached, but it does not show that no statutory goodwill has attached to the premises in question because in fact other houses in the neighbourhood have been more successful than this one has. I think that it is quite impossible to say, on such of the evidence as I have seen, and on the finding contained in the referee's report, that he ought to have held that in truth and in fact these people who have succeeded each other in carrying on this business have never contributed at all to the increase of the value of the premises by creating goodwill. What is said, and it is based on some evidence of Mr. Eve, is that really they would rather let it slide back, and, although, of course, there are some customers whom they brought there who still remain, on balance they have added nothing, because they have been letting a great many potential customers slip away. That is really what it comes to in substance, and I do not think that the referee would have been right if he had come to any such conclusion. Although the trade has not been as great lately as it was at one time, at the conclusion of the whole matter I think that there has been some addition to the value of the premises through the goodwill which has attached by the efforts of the tenants. The question is whether the referee has correctly assessed it. He has gone into the question very carefully. He does not seem to me to have assessed at all an exaggerated sum by way of compensation. After all this length of time, a sum of £368 does not seem excessive. Of course, the referee would have awarded much more if he had not been careful to observe the terms of proviso (c), and if he had not been careful, as I think he has been, to remember that he must take into account only the customers, or the body of custom, attributable to the efforts of the tenant and his predecessors in title, and likely to remain as an asset to the house.

The next question, and the only question which really troubled me a little, is whether, in the circumstances, it would be right to say that there should be a new lease. I think, looking particularly at what MAUGHAM, L.J., said in *Whiteman Smith Motor Co., Ltd. v. Chaplin* (2), at p. 55, that this is just one of those cases where a new lease ought to be granted. Under the Act the tenant cannot get any compensation at all for that particular body of custom which he has created by his own efforts, and which is so personal that it has attached to him and not to the premises. It may seem a little harsh, but the reason is that it is not a benefit which the landlord is going to get. He will either have to go elsewhere, or take the alternative of a tenancy from year to year on such

terms as the landlord chooses to give him. I think, on the whole, that it is fair that he should have a new tenancy, but that ten years is rather a long period. I do not quite understand why the referee thought that there should be a break at the end of seven years at the option of the tenant. Mr. Vaughan suggested that my own doubts might be

A satisfied, and that I might make the fairest award, to which his client would not object, if I said that the break was to be at the option of either party to the lease, and that order I propose to make. That is to say, I adopt the report of the referee so far as his final award is concerned, subject only to this amendment, that the lease may be

B terminated by proper notice—that will be found, I suppose, in the existing lease, or, at any rate, the parties can agree about it—at the end of seven years. Otherwise there will be a lease for ten years. That, I think, covers the whole of the ground.

C Solicitors: *Winch & Winch* (for the applicant); *Sprinz & Sons* (for the respondent).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

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SHARP v. AVERY AND KERWOOD.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), **October 20, 1938.**]

E *Negligence—Action for damages for personal injuries—Motor cyclists—Agreement by leading one to act as pilot to second motor cyclist carrying pillion-rider—Accident due to pilot accidentally leaving road—Whether injured pillion-rider can recover.*

The plaintiff was riding on the pillion of the third party's motor cycle. The defendant, who was also riding a motor cycle, had agreed to lead them, as he was familiar with the road. At a left-hand bend, the defendant drove straight ahead off the road on to a piece of waste land. He then applied his brakes, whereupon the third party, who had followed him off the road, slightly collided with him, and the plaintiff was injured. It was contended that the plaintiff could not recover against the defendant, as the latter owed him no special duty, and his injuries were due to the negligence of the third party in driving off the road:—

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HELD: in the circumstances of this case, the defendant, having undertaken to lead the third party and the plaintiff, was under a duty to both of them not to put them in a position of danger.

[EDITORIAL NOTE. It is to be noted that, though an agreement is found to have been made with the second cyclist, no express agreement was made with the pillion-rider. The latter was present when the agreement was made, and it is held that

H his safety must have been present to the mind of the contracting party when the agreement was made. There was, therefore, a duty upon the leading cyclist to take care that he should not do anything which might entail injury to the pillion-rider.

AS TO THE APPLICATION OF THE PRINCIPLES IN *DONOGHUE v. STEPHENSON*, see *HALSBURY*, Hailsham Edn., Vol. 23, pp. 632-634, para. 887; and FOR CASES, see *DIGEST*, Supp., Negligence, Nos. 364a-364f.]

Cases referred to :

- (1) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (2) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; 36 Digest 29 151; sub nom. *Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154.
- (3) *Smith v. London & South Western Ry. Co.* (1870), L.R. 6 C.P. 14; 36 Digest 29, 150; 40 L.J.C.P. 21; 23 L.T. 678.
- (4) *Singleton Abbey (S.S.) v. Paludina (S.S.)*, [1927] A.C. 16; 36 Digest 120, 798; 95 L.J.P. 135; sub nom. *The Paludina*, 135 L.T. 707.
- (5) *Weld-Blundell v. Stephens*, [1920] A.C. 956; 36 Digest 126, 837; 89 L.J.K.B. 705; 123 L.T. 593.
- (6) *Oliver v. Birmingham & Midland Motor Omnibus Co., Ltd.*, [1933] 1 K.B. 35; Digest Supp.; 102 L.J.K.B. 65; 147 L.T. 317.

APPEAL from a decision of MACNAGHTEN, J., dated Feb. 22, 1938. Sharp, the plaintiff, was the pillion-rider on a motor cycle driven by Kerwood, the third party. In company with Avery, the defendant, who was also on a motor cycle, they were proceeding from London to Southend. It had been agreed between them that, as Avery knew the road, he should lead the other two, who followed behind him at a distance of about 8 yds. At a left-hand bend, Avery, who had not got his lights full on, mistook the road and drove straight ahead on to some waste ground. He then applied his brakes and skidded forward, gradually slowing down. Kerwood followed him on to the waste ground, and a slight collision occurred, as a result of which Sharp was thrown into a ditch and received injuries.

Gilbert Beyfus, K.C., and *Montague Berryman* for the appellant.

Donald McIntyre for the respondent.

Beyfus, K.C. : The negligence of Avery was not a *causa causans*, but a *causa sine quâ non*. Kerwood's intervening act of negligence caused the damage. Otherwise there would have been no accident to the plaintiff. [Counsel referred to *Re Polemis & Furness, Withy & Co.* (2), *Smith v. London & South Western Ry. Co.* (3), *Singleton Abbey (S.S.) v. Paludina (S.S.)* (4), *M'Alister (or Donoghue) v. Stevenson* (1) and *Weld-Blundell v. Stephens* (5).]

McIntyre : The defendant owed a duty to take reasonable care. There was a definite agreement that Avery should lead Kerwood. [Counsel referred to *Oliver v. Birmingham & Midland Motor Omnibus Co., Ltd.* (6).]

Beyfus, K.C., in reply : Avery was under no duty to Kerwood not to go on to the rough ground.

GREER, L.J. : This case involves considerations which will probably never arise again in any case of personal injuries. It raises questions of some importance, and we have had to consider, not only what the judge said in his judgment, but also what this court ought to say (having regard to the consideration that this is a re-trial, a re-hearing), not only on questions of law, but also on questions of fact. If the judge in the court below says "I have heard certain witnesses and do not believe

a word they say. I do not like the way in which they give their evidence, and they have not carried conviction to my mind," we cannot interfere with that. However, if he has not said anything of that sort, then we are entitled to form our own view of the weight of the evidence which has been given.

- A In this case, the unfortunate plaintiff was seated as a pillion-rider on a motor cycle which was driven by a man named Kerwood, and, in my judgment, he was in a position in which he was entitled to say that Kerwood and he were following a pilot who knew the road, and that the pilot, Avery, knew perfectly well that Kerwood and the man on the
- B pillion were following him, and that they might be only about 8 yds. behind him. I personally accept the evidence of Mr. Sharp, senior, when he says that on the very evening of the accident Avery made a statement to him in the presence of Kerwood to the effect that on their journey between London and Southend there was an understanding,
- C amounting to an arrangement, that the man who knew the road—that is to say, the defendant Avery—should go on in advance, and that the others should follow. When he came to a bend to the left in the road, instead of following the road to Southend, Avery decided to go straight on. He had no reason to be guilty of that want of care, because, if he had had
- D all his lights on, he could have seen quite clearly that there was a bend in the road, and not only could he have seen that on the night in question, but, knowing the road, and having professed to be acquainted with the road, it was all the more incumbent on him not to mislead those who were behind him by failing to take the bend which he could have taken
- E if he had exercised reasonable care. What happened then was that, instead of keeping to his proper side of the road and going round the curve, he went straight on. That took him on to a little island of rough ground, which was far beyond his side of the road, and there, with the knowledge that the unfortunate plaintiff and the man who was driving the other
- F motor cycle might be almost immediately behind him within, as I think it was said, half a second, instead of doing what I think he might have done to avoid any possible risk to the people who were following him—namely, turning to the left to go back to his own side of the road—he put on his brakes, with the result that those who were behind him
- G came into collision with his motor cycle, and ultimately were landed in the ditch on the wrong side of the road. It seems to me clear to demonstration that, in those circumstances, there was a lack of reasonable care on the part of the defendant Avery, and that that lack of reasonable care amounted to a breach of his duty to exercise reasonable care towards
- H those who were behind him. If any question arose, it related solely to the man upon the pillion, because the man upon the pillion could say, "It is a matter of indifference to me whether the driver of my vehicle is to blame as well as the driver of the vehicle in front of me," because he would have been able to proceed against both or either of them.

In those circumstances, I have come to the conclusion that there is no

good ground for disturbing the finding of the judge. I am not by that saying that I agree with every word in his judgment, but I think that, upon the true facts of the case, his judgment was sound.

I think that I ought to refer, first of all, to a passage in the evidence of Mr. Sharp, senior. He was asked this question as to a conversation which took place with Avery and Kerwood :

Can you remember anything that Avery said on that occasion ?—Yes, that Kerwood was leading and Avery suggested he knew the road, and Kerwood was following him when they got to this part [the place where the accident happened].

In those circumstances, it passes my comprehension to understand why it can be said that there was no duty on the part of Avery, who was leading, and who says that he knew the road, towards those who were immediately behind him. Kerwood was there at the time, and took no exception to the statement which was made by Avery. Later, the judge said to Mr. Beyfus :

There is no disputed fact in this case yet, except as to whether the two vehicles came into collision. That seems the only point in dispute. Is not that so ?

The answer of Mr. Beyfus was :

Yes, my Lord, except possibly as to whether he went over the kerb or not.

After that answer, it is impossible to say that there was any real case made that Avery was not leading the other two at the place where the accident occurred. That being so, it seems to me to be quite clear that there was a duty on Avery's part to take reasonable care that that which he did would not put in a position of danger the other two, who might be almost within 8 yds. of where he was. He found that he was somewhere where he ought not to be, and, instead of getting back to where he ought to be, he put on his brakes, and thereby caused the collision. He had every opportunity, if he had exercised reasonable care at that time, of getting back to his own side of the road. I have not thought it necessary to refer to any further parts of the evidence, although there are here and there passages in the evidence which appear to confirm that view of this case. In my judgment, the appeal must be dismissed, with costs.

SLESSER, L.J. : I am of the same opinion. This case is by no means an easy one, and it is necessary, in my opinion, in the first place, in order to arrive at a correct decision as to whether or not this appeal is well-founded, to decide whether there was any duty owed by the defendant Avery to Sharp, the pillion-rider on Kerwood's motor cycle. There is a tendency to dismiss the problem of this class of case by merely investigating whether or not a particular person is careless, and from that it is fatally easy, by transposing the word "careless" into "negligent," to dismiss from one's mind the essential problem—namely, whether or not there was in any particular case a failure of duty. The way in which failure of duty is put in this case, as I understand it, is this. I shall take,

first of all, the case of Kerwood, who was the motor cyclist following Avery. What duty, if any, had Avery to Kerwood not to leave the road and go upon the rough unenclosed patch which caused the accident ? In the ordinary course of events, I should be inclined to say that, because a motorist in front of you leaves the road and goes into a private drive,

A or goes on to a patch which is not upon the highway—assuming that he does that in such a way as not to embarrass you while he is on the highway—there is no duty upon him to have regard to the fact that you may be following him. However, what is said to be the fact that makes this case exceptional is that here there was an arrangement between
B Avery, the motor cyclist in front, and Kerwood, who was following him, that Kerwood should follow Avery, because he, Avery—the pilot, as he has been called in the case—knew the road, and Kerwood did not. That is substantiated by the evidence of Ernest John Sharp, the father of the pillion-rider, who said in examination-in-chief that Avery stated
C that he knew the road, and so he was leading and Kerwood was following. He also states in cross-examination that that statement was made in the presence of Kerwood.

In those circumstances, it does appear that the judge perhaps has not wholly based his judgment upon that statement, but rather, as he says,
D upon the reasonable obligation which he finds to exist in the circumstances, it being admitted that Kerwood was following Avery, and the whole question being whether Avery accepted the responsibility of showing Kerwood which way to go. From this, it would follow that the reasonable assumption is that Kerwood was dependent upon Avery
E and that Avery ought to be assumed to know that Kerwood was dependent upon him. The judge puts it actually in this way :

It is quite true that they were both going to Southend, and that Mr. Kerwood was following Mr. Avery, and it might reasonably be anticipated that Mr. Avery would guide him in the right course, and that he would expect that Mr. Kerwood would follow close behind him.

F During the course of the argument, MACKINNON, L.J., asked counsel whether there was any direct evidence, not only that Kerwood was following Avery, but also that Avery knew that Kerwood was following him and was relying upon him, which might impose upon him a duty
G to take care. There is the evidence of Mr. Sharp, senior. Mr. Kerwood says that he himself is not quite certain, and cannot positively say whether or not Avery was relying upon him, and Avery, it is true, says that it was not so. However, GREER, L.J., has drawn attention to the fact that Mr. Sharp had given positive evidence that Kerwood
H had said that Avery knew that he, Kerwood, was relying upon him. Then what is the position ? Kerwood is trusting Avery to take him safely to Southend. Avery admittedly, when he gets to a bend in the road, instead of safely following the road to Southend, plunges straight over some rough ground and puts on his brakes, in consequence of which, being on that ground, and the other man being 8 yds. or 9 yds. behind

him, Kerwood runs into him, pitches into the ditch, and throws off the pillion-rider.

I think that, in the exceptional circumstances of this case, although there was no contractual relationship between the parties, yet, on the general principle that, when one person by his conduct invites another to rely upon his skill to do something which he otherwise might not do, after that, he may owe a duty to the person whom he has invited to place reliance upon him, and may be liable if he fails in the skill which he represented that he possessed, and in reliance of which the other man altered his course of conduct. Here Avery represented that he had the skill properly to choose the road to Southend. Kerwood relied upon his representation. It proved that he had not the skill, that he left the road, and so, like a will-of-the-wisp, lured Kerwood to his doom. That is the first question in the case.

The second question which arises is this. Is the pillion-rider, who made no express arrangement, also entitled to complain of that negligence? I think that the answer is in the affirmative. I should have had some doubt about the answer, there being no direct relation between the parties, were it not for the decision of the majority of the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (1). There LORD ATKIN, in a much-quoted passage, says, at p. 580 :

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Here, these three young men were together. Avery offers to lead Kerwood, the other motor cyclist, safely to Southend. The pillion-rider is present, and mounts the second motor cycle, I think, upon the basis that, with that skill, he is going to be piloted safely by Avery. I think that that is exactly a case where the pillion-rider is so closely and directly affected by the act of Avery that it is reasonable to say that Avery had the pillion-rider as well as the driver (Kerwood) in mind as being affected by his offer.

I would add finally only that the essence of Mr. Beyfus' argument was that the pillion-rider could not complain, because the negligent act of his driver, Kerwood, was a *novus actus interveniens*, and, therefore, that, whatever duty might exist in Avery, that was not the cause of the pillion-rider's action for negligence. I do not agree. I think that there is a continuing negligence if Avery has gone on to that rough ground and invited Kerwood to follow him. If he had not done so, Kerwood would not have followed him. I do not think that this is like that class of case where an entirely new act of negligence happens. This is a case of continuing negligence on the part of Avery, and of possible contributory negligence on the part of Kerwood, but of contributory negligence which would not, there being no identification of

Kerwood with the pillion-rider, so identify the pillion-rider as to deprive him of his remedy against the defendant Avery. For these reasons, I agree that this appeal fails.

A MACKINNON, L.J. : I agree. There is no doubt that, in leaving the road and going off towards the ditch, Avery was careless and unskilful, and there is no doubt that Kerwood was following him, and that Sharp, by reason of being on Kerwood's motor cycle, was injured. However, the question—and the difficult question—in this case follows upon that.

B There is no legal liability for negligence or carelessness unless the negligence is in breach of a duty of care owed by the negligent person to the plaintiff who is complaining of injury. The real question in this case is whether, in piloting Kerwood's motor cycle, there was any duty of care owed by Avery to Sharp. There was a stage at which I was inclined to think that there was no evidence on which such a duty could be said to be

C established, but Mr. McIntyre's admirable argument has quite convinced me that I was wrong in that view. I do not think that there was any evidence upon which it could be said that there was any agreement by Avery that he would pilot Kerwood. I am not sure that there was evidence that Avery knew, from something Kerwood had said, that he

D was relying upon his piloting, but I think that there was evidence that, in all the circumstances, Avery, as a reasonable man, knew that Kerwood was trusting to him as pilot, and would follow his lead.

E The judge does not discuss the point of law which I think was really involved in this case. That is to say, he does not do so in terms as a point of law. Nevertheless, I think really that that last proposition I was suggesting was the ultimate basis of his judgment, as appears from a passage where, in the course of his judgment, the judge says :

F Mr. Kerwood was following Mr. Avery, and it might reasonably be anticipated by Avery [as I think that it should be] that Avery would guide him in the right course, and that he, Avery, would expect Kerwood would follow close behind him.

On all the evidence, I think that that is a reasonable inference to draw from the facts, and that from those facts there is established a duty of care on Avery the breach of which, if it resulted in damage to Sharp, renders him liable to a claim by Sharp. That being so, I think that this

G appeal fails, and should be dismissed.

Appeal dismissed with costs.

Solicitors : *Berrymans* (for the appellant) ; *A. H. Hepburn* (for the respondent).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

Re A DEBTOR (NO. 441 OF 1938), *Ex parte* PETITIONING CREDITOR *v.* DEBTOR.[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
October 21, 1938.]*Bankruptcy—Petition—Service—Service out of the jurisdiction—Necessity that nature of document served be brought to notice of debtor—Bankruptcy Act, 1914 (c. 59), s. 5 (1)—Bankruptcy Rules, 1915, rr. 155, 156, 158.* **A**

A petition founded upon a failure to comply with a bankruptcy notice was presented against a debtor resident in Paris. An order was made giving the petitioner liberty to serve a sealed copy of the petition, together with a sealed copy of the order, personally on the debtor at an address mentioned in Paris, or elsewhere in France. A sealed envelope, addressed to the debtor, but bearing on its outside no reference to its contents, was handed in at the debtor's address in Paris. The letter in fact contained sealed copies of the petition and order. The letter was posted from Paris to the debtor's solicitors in London, with a covering letter stating that it had been handed in to a client of the debtor's brother, and that the client accepted it. Upon receipt in London, the letter had been opened. When the petition came on for hearing, the debtor's brother stated in evidence that the letter had been delivered to himself, but the registrar did not accept this evidence:—

HELD: it is necessary for proper service, both in the case of a writ and in that of a bankruptcy petition, that the nature of the document delivered shall be brought to the notice of the person served. The facts of the present case were insufficient to prove this, and a new order for service out of the jurisdiction must be made. **D**

[EDITORIAL NOTE.] It was attempted in this case to show that the rule relating to the service of a bankruptcy petition is not so strict as that relating to the service of a writ. This contention is rejected, and in both cases it is necessary that the nature of the documents served should be expressly brought to the notice of the person served. **E**

AS TO SERVICE OF BANKRUPTCY PETITION, see HALSBURY, Hailsham Edn., Vol. 2, pp. 72, 73, para. 87; and FOR CASES, see DIGEST, Vol. 4, pp. 136-138, Nos. 1259-1275.]

Case referred to:

- (1) *Banque Russe et Francaise v. Clark*, [1894] W.N. 203; Digest, Practice, 314, 395. **F**

APPEAL from the order of Mr. Registrar KEAN, made July 8, 1938, dismissing a petition presented by the appellant, and also ordering him to pay the respondent's costs. The appellant further asked (i) that a receiving order be made in respect of the estate of the respondent, (ii) alternatively, that the petition be remitted to the registrar with such directions as the court should think fit, (iii) alternatively, that the petition be dismissed without costs, and (iv) that such further and other order should be made as to the court might seem just. The petition was dated June 1, 1938. **G**

J. B. Blagden for the appellant.

Sergeant Sullivan, K.C., and *G. F. Kingham* for the respondent.

Blagden: A receiving order should have been made if the registrar had considered that there was an act of bankruptcy and a good petitioning **H**

creditor's debt. The registrar only considered the question of service. If he was not satisfied with the proof of service, he should have adjourned the matter for the service to be made effective. The registrar was clearly exercising his discretion on a wrong principle in dismissing the petition with costs. The petition alleges a substantial debt due to the petitioning creditor, an absence of security, and an act of bankruptcy by non-compliance with a bankruptcy notice. On June 8, 1938, an order was made for service of the petition at an address in Paris, or elsewhere in France. A sealed copy of the petition, together with the order for substituted service, was put into an envelope, and this envelope was given into the hands of a man. The registrar has found as a fact that that man was the debtor himself. The registrar said that, if the petition had not been delivered in a sealed envelope, he would have been satisfied that good personal service had been effected. The envelope was addressed to the debtor. I do not suggest that there was personal service within the meaning of the rule when the envelope got into the debtor's hands, but there was at the moment he opened it. This was a plain case for an adjournment. There was no ground for giving the debtor any costs. [Counsel referred to *Banque Russe et Francaise v. Clark* (1).]

Sullivan, K.C. : The question of dismissal or adjournment is one which might have been brought to the notice of the registrar. The matter comes before the court without there having been any application to the registrar. I do not know why this petition is persisted in at all. When a debtor is out of the jurisdiction, the rules provide both the manner and the time of service.

Kingham, following on the same side : At the hearing, the court requires proof of the debt, and also of the service of the petition. By the Bankruptcy Act, 1914, s. 3 (5), it is provided that, if the court is not satisfied as to the service of the petition, it may dismiss the petition. The registrar has a discretion. He had the facts before him, and he was entitled to dismiss the petition.

SIR WILFRID GREENE, M.R. : This appeal raises a point of some general interest in relation to the service of bankruptcy petitions. The appeal is by a petitioning creditor, and he appeals against an order of Mr. Registrar KEAN, who, on July 8, 1938, dismissed the petition with costs, the ground upon which he dismissed it being that, as he found, the petition was not properly served. The petition, which is founded upon failure to comply with a bankruptcy notice, was presented on June 2, and, by the order indorsed upon it in the usual form, July 8 was fixed as the date of hearing. As appears on the face of the petition, the debtor was at the time resident in Paris. On June 8, 1938, an order was made giving to the petitioner liberty to serve a sealed copy of the petition, together with a sealed copy of this order, personally on the debtor at an address mentioned in Paris, or elsewhere in France. I have quoted the words of the order, which is, of course, in common form. The order

then proceeded to direct that the petition be heard on July 8, 1938, at 11 a.m.

It appears that on June 25 a person employed by a firm of detectives in Paris went to the address named in the order for service out of the jurisdiction bearing an envelope sealed, addressed to the debtor by name, but not containing upon its outside any reference to its contents. A Its contents in fact were a sealed copy of the petition and a sealed copy of the order for service out of the jurisdiction, dated June 8. The next fact to which I need refer is this. In due course of post after June 25, 1938, the debtor's solicitors in London received a letter signed by the debtor's brother enclosing the envelope in which the documents B had been handed in, together with its contents, and the envelope was open. The letter stated that the envelope had been delivered to one of the writer's clients that morning, and that that client accepted it. The writer then said that, the letter being for his brother, who was not present there, and concerning his legal business, he thought that he was right in C sending it to the solicitors. The solicitors informed the registrar of what had happened, and suggested that, in their view, there had not been proper service. After some further correspondence, on July 8 the petition came on for hearing. Evidence was given by the person who had delivered the envelope at the address in Paris, and also by the D debtor's brother, who had sent the letter of June 25, 1938. I need not go into the details of that evidence, but I may say that the debtor's brother put up a case entirely different from that which he had stated in his letter—namely, that it was to himself that the envelope had been delivered. The registrar refused to accept the evidence of the E debtor's brother, and his decision was in these words :

I am not satisfied there is good personal service, for the reason that the documents were delivered in a sealed envelope and no indication of their nature was stated. I cannot accept the debtor's brother's evidence, as his story to-day is wholly inconsistent with the story contained in the letter of June 25. But for the fact that the documents were delivered in a sealed envelope, I should have F been satisfied that the debtor has been personally served. I dismiss the petition with costs.

It seems to me that that finding necessarily involves a finding that the person to whom the envelope was handed was the debtor himself, because what it means is that, if the documents had been delivered outside the G envelope, instead of inside, the debtor would have been personally served, and that must mean (and there was ample evidence upon which the registrar could find) that the person to whom the envelope was handed was the debtor himself.

In those circumstances, Mr. Blagden, on behalf of the appellant, raises H three matters. First of all, he says that on the facts there was good service. Secondly, he says that, assuming that that is wrong, the registrar, instead of dismissing the petition, ought to have adjourned it, and fixed a different return date. Thirdly, he says that in any event the petitioner ought not to have been ordered to pay costs, particularly

in view of the untrue evidence that the debtor's witness had given. The only matter of general interest is the first point. Before I deal quite briefly, as I shall, with that point, I must refer to the statutory provisions with regard to service of a bankruptcy petition. The Bankruptcy Act, 1914, s. 5 (1), provides as follows :

A A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner.

Therefore, there is, as one would expect to find, an express direction for service. The manner of service is prescribed by the rules, beginning with r. 155, the rule which deals with personal service of the petition

B in the normal case :

A creditor's petition shall be personally served by delivering to the debtor a sealed copy of the filed petition.

Rule 156 provides as follows :

A petition shall be served upon the debtor by an officer or bailiff of the court, or by the creditor or his solicitor, or by some person in their employ. . . .

C Then there is a provision for substituted service in suitable cases. Rule 158 provides as follows :

Where a debtor petitioned against is not in England, the court may order service to be made within such time and in such manner and form as it shall think fit.

D One thing I think is clear when one looks at those rules and remembers the class of subject-matter—namely, service of process, which is always regarded as being a matter of great strictness—and that is that the direction, and the governing direction, is for service. Delivery is the manner of service, but the question is what “delivery,” in that context, means ? Mr. Blagden wishes us to say, in the first place (and I do not

E think he pressed us very hard), that, by delivering to the debtor in person the envelope which physically contained these documents, service within the rule was duly effected, that there was physical delivery to the person in question. I am quite unable to construe the section and the rules in any such sense as that, because it appears to me that,

F on those assumed facts, what is after all the essential thing in service cannot have been complied with, the essential thing being that the documents served shall be brought to the personal knowledge of the person whose concern it is. In the case of a writ, of course, a writ is a

G command in the King's name, and, in order that that command may be effectively given, service of the writ, or a copy of the writ, or notice of the writ, if out of the jurisdiction, is required. In the case of a writ, it could not be suggested, I venture to think, that mere proof of delivery of a sealed envelope containing the copy of the writ, or notice of the writ, would be sufficient service. Mr. Blagden suggested that, in the

H case of a bankruptcy petition, the rule is not so strict, because, whereas, in the case of a writ, the rule for service—R.S.C., Ord. 9, r. 2—is as follows :

When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made. . . .

—in the case of a bankruptcy petition, the rule is satisfied by mere physical

delivery, even if the documents to be served are delivered in a sealed envelope. In the case of a writ, of course, the method of serving a writ is well-known and fixed by a practice of generations, and, indeed, centuries. This is what is said in *THE ANNUAL PRACTICE*, 1938, at p. 61 :

A
A copy of the writ should be delivered to and left with the person to be served. If he refuses to take it, it must be left with him, not taken away. If the defendant is informed of the nature of the process, and the copy thrown down, that, it seems, would do. . . . The original writ must at the same time be shown to him, if he requires it, otherwise all the proceedings founded on the writ may be set aside.

B
It is no exaggeration to say that the practice in regard to writs, and the requirements of the law in regard to the service of writs, are, and have always been, regarded as matters *strictissimi juris*. In the case of the service of a bankruptcy petition, I can see nothing in the section and rules which can fairly be construed as relaxing the strict requirements which are to be found in the case of the service of writs and other documents under the rules of the Supreme Court. I therefore hold that C
Mr. Blagden's first point—namely, that mere proof of delivery of the documents in a sealed envelope, without more, would be sufficient—fails.

D
Then Mr. Blagden says that, on the facts of this case, the inference ought to be drawn that the contents of the document actually came to the knowledge of the debtor. In support of that he points to two circumstances, (i) that the envelope was opened, and (ii) that it was addressed to the debtor. From the combination of those two circumstances, he says that it ought to be inferred that the envelope was opened by the person to whom it was addressed, and that that person, having opened E
the envelope, examined and discovered the nature of its contents. Whatever inferences may be drawn from other matters, I find it quite impossible to draw inferences of that kind in a matter of so strict a nature as service. It would be intolerable, and would lead to the gravest injustice, if a litigant who was desirous of bringing his opponent before F
the court by proper process could satisfy the requirements of the law as to service by proving facts such as those, and asking the court therefrom to draw an inference as to the crucial fact having happened, the crucial fact being the coming of the document into the hand of the person to be served in such manner that the nature of it is brought to his mind. G
Unless it comes to his hand in that way, and unless that is established beyond any possibility of doubt, it seems to me that the court would be departing from the most salutary view of these matters if it indulged in inferences based on evidence which might be quite strong for other purposes, but which, for a purpose such as this, in my judgment, ought H
not to be drawn. I am not laying down any general rule as to the circumstances in which it may be possible to prove service notwithstanding delivery in a sealed envelope. For example, if the envelope were opened by the addressee in the presence of the server, and the contents inspected, that would be one case. There may be other border-

line cases, and I do not wish to prejudice any future case on its facts. What I am saying is that, in a case of this kind, the evidence being such as it is, the court should not, and will not, draw any inference as to whether or not the document came to the notice of the person to whom it was addressed. The substantial point, therefore, fails.

A There remain only the other two points. The registrar, acting under sect. 5 (3) of the Act, dismissed the petition. That section provides :

If the court is not satisfied with . . . the service of the petition, or is satisfied . . . that for other sufficient cause no order ought to be made, the court may dismiss the petition.

B In the present case, as I say, the registrar dismissed the petition, but I cannot think that, in doing so, he can have had properly before his mind the fact that, on the facts of this case, the debtor has been fortunate enough to escape on a matter of great strictness, and also that the result of dismissing the petition may be to work a serious injustice. This is

C a case where a slip was made in the matter of service, and it seems to me that the registrar ought not to have allowed that to lead to a dismissal of the petition, but ought to have given facilities for remedying it. That could quite easily have been done by fixing a different date for the hearing of the petition, which would have meant that both the order indorsed

D on the petition and the order for service out of the jurisdiction, in so far as it deals with the date of hearing, would have to be amended by subsequent order, and that, that date having been fixed, the petitioning creditor, if he could successfully do so, would be entitled to serve the debtor. That seems to me to be the course which he ought, in order to

E do justice, to have followed, and I cannot see any adequate ground for dealing with the matter in the way in which he did.

The last point remains, and that is the question of costs. Mr. Blagden wishes us to say that the registrar in any event ought not to have ordered the costs of the hearing before him to be paid by the petitioning creditor.

F In my judgment, that is an order with which we cannot possibly interfere. The petitioning creditor was responsible for proceedings taking place at a time when the necessary foundation for them was absent—namely, service—and I can see no reason why he should not have been ordered to pay the costs. Accordingly, the order of the court will be that the order

G of the registrar be discharged, that the petition be referred back to him in order that a new date may be fixed, and that the consequential order be made providing that that date is to be the effective date, notwithstanding what is said in the indorsement on the petition and in the order for service out of the jurisdiction. That, of course, will involve

H the making of a new corrected indorsement on the petition itself. So far as the costs of this appeal are concerned, there will be no costs of the appeal on either side. I should have added, when I said that the order of the registrar will be discharged, that it will be discharged save as regards costs. His order as to costs will stand. There will have to be a new order for service out of the jurisdiction, and, of course, it will be

a sealed copy of that order which will be served with the sealed copy of the petition.

SCOTT, L.J. : I agree.

CLAUSON, L.J. : I agree.

Solicitors : *L. A. Hart* (for the appellant); *Bowkers* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Observations of LORD HEWART, C.J., and CHARLES, J., at pp. 99, 100, not approved. PENNY v. NICHOLAS. [1950] 2 All E.R. 89.

MELHUISH v. MORRIS.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 14, 1938.**]

Street Traffic—Speed-limit—Speedometer—Evidence by two police officers of speedometer reading—Sufficiency of evidence—Road Traffic Act, 1934 (c. 50), s. 2 (3).

The appellant was charged with driving a motor vehicle at a speed exceeding 30 m.p.h. The only evidence given in support of the charge was that of two police officers, who, travelling in the same police car, stated that the appellant had been driving at speeds of 38, 40, 42 and 44 m.p.h. They based these statements merely upon observation of the speedometer on the police car. No evidence was given of the accuracy of the speedometer :—

HELD : such evidence, based upon observations of one instrument, without proof of its accuracy, and without evidence of the opinion of an experienced person as to the speed at which the appellant was travelling, was not, under the Road Traffic Act, 1934, s. 2 (3), sufficient to convict the appellant.

[EDITORIAL NOTE. The Road Traffic Act, 1934, s. 2 (3), prevents a person from being convicted upon the opinion of one witness as to the speed at which he was travelling. It was here sought to say that the evidence of the two police officers was sufficient compliance with the terms of the section. The court, however, points out that, where the evidence of the police officers is based upon the observation of one and the same speedometer, it is not sufficient to satisfy the terms of the section. It will be noted that the section speaks of the "opinion" of the witness, and it cannot be said that the result of the observation of the speedometer represents an opinion.

AS TO SPEED LIMIT, see HALSBURY, Supp., Street and Aerial Traffic, para. 682 ; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 199a-207a.]

APPEAL by way of case stated from a decision of the justices at Ruabon, given on Mar. 11, 1938. The appellant was charged with exceeding the speed limit of 30 m.p.h. At the hearing, evidence was given by two police officers that the speedometer of the police car which was following the appellant registered speeds of 38, 40, 42 and 44 m.p.h. Upon this evidence, the appellant was found guilty and fined £1. The Road Traffic Act, 1934, s. 2 (3), enacts a new subsect. (3) in substitution for the Road Traffic Act, 1930, s. 10 (3), in the following terms :

A person prosecuted for driving a motor vehicle on a road at a speed exceeding a speed limit imposed by or under any enactment shall not be liable to be convicted

solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding that limit.

T. J. F. Hobley for the appellant.

No counsel was instructed for the respondent.

A **MACNAGHTEN, J. :** In this case, I have the misfortune to differ, but I do so with the greatest doubt. The case states :

We [the justices] formed the opinion that the case was proved by the evidence of the respondent and Hughes.

B I come to the conclusion that the evidence given by the respondent and Hughes was evidence of fact that, in the opinion of more than one witness, the speed limit had been exceeded. If that is what the magistrates meant, then the provisions of sect. 2 (3) have been satisfied. That is how I read the opinion expressed by the magistrates, and I have come to the conclusion that they reached a correct decision in this matter.

C **CHARLES, J. :** It would appear, as I read the case, that the speed was assessed by the examination of the speedometer in the police car, which, so far as the evidence goes, was not tested either before or after the time at which it was alleged that the vehicle was driven at more than 30 m.p.h. The question arises whether the observation and examination of that speedometer, without any accompanying evidence of its accuracy, are sufficient to justify a conviction. It is quite clear that, if evidence had been given that the speedometer had been tested, and had been found to be working accurately, or if evidence had been given by the officers in the case that, as men of experience, they deduced that the speedometer was registering accurately, and, further, that, in their experience, 30 m.p.h. was exceeded, this appeal would fail. Upon looking at the case before us, however, one finds that the evidence was that the speedometer registered from 38 to 44 m.p.h., and it was evident that each policeman was basing his evidence, not upon observations of his own, but upon a meticulous observation of the speedometer in the course of the pursuit. That does not appear to be independent evidence based on experience. Therefore, the case rested upon the accuracy of the speedometer, which had not been tested. It was argued that there was corroboration because two police officers gave evidence, but here again the evidence of both police officers was merely of observation, and not evidence of experience or opinion. It does not matter if five officers glued their eyes to the speedometer if evidence is not given as to its accuracy. It is quite clear that the justices assumed that the case was proved by two men's observations of the speedometer, and that the respondent relied upon the evidence of a mechanical device, without giving any evidence of its accuracy. I think that the appeal should be allowed.

LORD HEWART, L.C.J. : It is of great importance to see what exactly this case stated means. It is unfortunate that only one side was present

to argue the case. The evidence of the speed of the appellant's vehicle was the evidence of observation given by two police officers. What had the police proved? Nothing at all, except the results of the observation of the speedometer—that is to say, the figures exhibited by that instrument. Neither of the officers, as the case shows, spoke of his personal opinion, or of his personal experience of such matters. The case for the prosecution rested only on the observation and recitation of the results exhibited on the speedometer. It was, in other words, the reliance of the officers upon a mechanical device. It has been argued for the appellant that the speedometer might not in fact have been accurate, and that the mere fact that the speedometer had registered certain figures had been treated as conclusive. The witnesses have not reinforced what they saw on the speedometer by any opinion or experience of their own. I cannot extract from the case anything which can even be said to contain a suppressed reference to an opinion. If the contest were between rival opinions, very different considerations might have applied, but here it is merely between a mechanical device, on the one hand, and the evidence of the appellant, on the other. The case really means that the police put forward the view that the speedometer spoke for itself. That view is a wrong one, unless, as has been said, it is also proved that the instrument is accurate. The Road Traffic Act, 1934, s. 2 (3), does not mean that a person may be convicted on the evidence of a person who merely describes what he saw on a speedometer, supported by the evidence of another person, who, in his turn, merely states what he saw on the same speedometer. Such evidence, resting on the mere sight of a speedometer, is not sufficient. The error that has here been made consists in leaving such evidence unsupported by supplementary evidence of another kind, such as an opinion as to the speed at which the car was travelling at the time. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Jaques & Co.*, agents for *Cyril Jones, Son & Williams*, Wrexham (for the appellant).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

CLAY HILL BRICK & TILE CO., LTD. v. RAWLINGS.

[KING'S BENCH DIVISION (Tucker, J.), **October 19, 1938.**]

Company—Directors—Payment to company—Chairman of directors and managing director taking cheque payable to himself personally—Whether debt to company discharged.

The defendant purchased bricks from the plaintiff company, dealing at all times with a person, B., who was in fact the chairman of the directors of the company and acting as managing director thereof, though, in fact, he had not been properly appointed to that office. At the request of B., the defendant, in payment for the bricks, handed B. cheques made payable to B. or his order, thinking the company was a one-man company. B. cashed the cheques and did not pay the

money over to the company. The articles of the company provided that the directors might delegate powers, authorities and discretions, and might annul or vary such delegation, but that no one dealing in good faith, and without notice of such annulment or variation, should be affected thereby:—

HELD: (i) there was a power under the articles to authorise B. to receive payments in cash, and, so far as the defendant was concerned, it must be taken that B. had in fact such authority.

(ii) the payment to the agent, B., by cheque made payable to B. or his order was, after the cheque had been honoured, a payment in cash, and the defendant had discharged his obligation to the plaintiff company. This was so, even assuming that the defendant had received notice that all cheques were to be made payable to the company.

Bradford & Sons v. Price Brothers (2), *applied*.

[EDITORIAL NOTE.] The decision herein applies a decision in respect of an ordinary agent—the agent in question being the manager of a branch establishment—to the case of an officer of a limited company. As is well known, such officers have what has been termed an ostensible authority, and it is here held that an officer who was both chairman of directors and managing director was authorised to receive cash payments on behalf of the company. It is true that such officers do not in the ordinary way receive cash payments, but no doubt they would in most cases have power to do so, and a third party is therefore entitled, as against the company, to assume such authority. It follows from this that such officers of companies may receive a cheque made out to them personally in payment of an account due to the company, and that such a cheque, when honoured, is a good discharge of the debt to the company, despite the usual notice that cheques are to be made payable to the company.

AS TO DIRECTORS AS AGENTS OF THE COMPANY, see HALSBURY, Hailsham Edn., Vol. 5, pp. 412, 413, para. 681, and pp. 423-425, para. 698; and FOR CASES, see DIGEST, Vol. 9, pp. 476, 477, Nos. 3120-3126.]

Cases referred to:

- (1) *British Thomson-Houston Co., Ltd. v. Federated European Bank, Ltd.*, [1932] 2 K.B. 176; Digest Supp.; 101 L.J.K.B. 690; 147 L.T. 345.
- (2) *Bradford & Sons v. Price Brothers* (1923). 39 T.L.R. 272; Digest Supp.; 92 L.J.K.B. 871; 129 L.T. 408.

ACTION by the plaintiff company against the defendant claiming £352 6s. 6d., the price of certain bricks sold and delivered by the plaintiff company to the defendant between June, 1937, and Aug., 1937. By the defence, the purchase and delivery of the bricks were admitted, subject to the defence that the bricks had been paid for by the defendant by payment to the authorised agent of the plaintiffs, one E. W. Barber. It was said, furthermore, that, if he was not the authorised agent, then the plaintiffs held him out as their authorised agent, and were estopped from denying his agency. There was a counterclaim for damages in respect of the quality of the bricks, which had been agreed and admitted at the sum of £20. The plaintiffs in reply denied that Barber at any material time was, or was held out by them to be, their authorised agent. On the contrary, they said that they had at all material times intimated to their debtors and to the defendant that all payments should be made to their registered office, No. 6, Broad Street Place, E.C.2.

Linton T. Thorp, K.C., and *Alban Gordon* for the plaintiffs.

F. R. McQuown for the defendant.

TUCKER, J. : The facts in this case are as follow. Prior to the time with which we are dealing—June, 1937—Mr. Rawlings had been getting his bricks from a company called Hooper and Ashby, Ltd. There had been some delay in getting deliveries, and these bricks he had been getting from Hooper and Ashby, Ltd., were being supplied to Hooper and Ashby, Ltd., by the plaintiffs, the Clay Hill Brick and Tile Co., Ltd. A Mr. Rawlings, having regard to the delays, was introduced to Mr. Barber by a representative of Hooper and Ashby, Ltd. When he was so introduced, Mr. Barber handed him a card—which has been put in evidence—which shows that Mr. Barber was described as the managing director. B The card is the card of the Clay Hill Brick and Tile Co., Ltd., Clay Hill, Newbury, Bucks, and the telephone number is 108. Then at the bottom there are the words : “Managing Director : E. W. Barber.” After some discussion, on May 26, Mr. Rawlings saw Mr. Barber in Newbury, and Mr. Barber said that he understood that Mr. Rawlings would be prepared to buy some mixed red bricks. Mr. Rawlings agreed, and said C that Mr. Barber showed him a long list of good debts for which the company were expecting to get payment. Mr. Rawlings said in evidence :

If I could take these red bricks and pay spot cash, he would sell them. It was simply, if I gave him the order, he would see that I got the bricks. I was to haul direct from his yard, and he said he would see, if I dealt direct with him, that D Hooper and Ashby got their commission.

That is to say, I suppose, that Hooper and Ashby would receive the profit that they would have made if they had been the intermediaries, as they had been before. Mr. Rawlings gave Mr. Barber a cheque for £200, which was a cheque to Mr. Barber’s order dated May 26, payable to him E personally. That cheque was paid in by Mr. Barber, and has been cashed by Mr. Barber. To complete the story of the cheques, two other cheques were subsequently paid in the same way, made payable to Mr. E. W. Barber. The other two were crossed cheques (the first one was not, otherwise there is no distinction) and dated June 15 for £75, F and July 29 for a further £75. Having come to that arrangement, Mr. Barber on June 2 sent this communication, written from his private house :

Holinwood, Kimpps Lane, Hersham, Surrey. June 2, 1937. Mr. A. E. Rawlings. Dear Sir, Re Clay Hill Brick Co., Ltd. I thank you for your order for the following G bricks [quantities are set out, totalling 110,000 bricks for the total sum of £392 10s.] I acknowledge the receipt of £200 on account of this order. You may commence drawing bricks at once.

Bricks were supplied from time to time, and there were delivery orders at the time of each delivery, all in the same form, addressed to Mr. Rawlings : “Please receive from the Clay Hill Brick and Tile Co., Ltd., H Clay Hill, Newbury.” Then there is a certain quantity of bricks, and then they are signed by somebody on behalf of the defendant—I suppose by the representative on the job. Bricks were drawn by Mr. Rawlings from time to time, and he saw Mr. Barber on the dates I have mentioned—

namely, June 15 and July 9—when he paid him these further cheques. On June 15, 1937, there is a receipt for the first of those cheques for £75 :

Received from Mr. A. E. Rawlings the sum of £75 being further amount on a/c of order for £395 bricks from Clay Hill Brick Co., Ltd., making £275 in all.

On Aug. 3, the company wrote a letter to the defendant :

A We enclose a statement of our account now due for bricks delivered in June and shall be glad to have your cheque in settlement thereof by return.

The enclosure in that letter was a statement showing that a sum of £220 1s. 6d. was due for bricks delivered up to the end of June, and there was a further account for bricks delivered during July, which was subse-

B quently sent to Mr. Rawlings. On receiving that, Mr. Rawlings saw Mr. Barber, to whom he had by that time paid this sum of £350, and Mr. Barber said that there was some mistake made, that Mr. Stevens was away, and that he would put the matter right and Mr. Rawlings need not trouble. Accordingly, Mr. Rawlings did not answer that letter

C of Aug. 3, and on Aug. 17 another letter was written, asking for payment of £220 1s. 6d. by return of post without fail. By that time, Mr. Rawlings admits that he had got a little suspicious and thought something might be wrong, and at that stage, at Mr. Barber's suggestion, he wrote some letter which Mr. Barber could show to Mr. Stevens, or

D someone else on behalf of the company, which would keep matters in abeyance for a time. Mr. Rawlings wrote saying that he was not available at that moment to see Mr. Stevens, or some letter to that effect. He did that at the request of Mr. Barber, Mr. Barber assuring him that everything would be put right on the next day, and the letter was written

E on that assurance. I have not heard Mr. Barber's defence, but it seems to be quite clear in this case that Mr. Barber was a dishonest man. He went bankrupt on June 16, and thereafter he was, until the end of July, acting as manager for the plaintiff company. At the time in question, when the first two cheques were paid, he was a director of the company.

F He was the chairman of the directors, and was in fact acting as managing director, although he had not actually received any appointment. When he joined the board in Jan., 1937, in place of Mr. Webb, he took over the duties which Mr. Webb had been performing. Mr. Webb had actually been managing director. Mr. Barber stepped into his position but was

G not actually appointed managing director, although he acted as such. That was his position in May, when the order was given for the bricks, and when the first two cheques were paid. When the last cheque was paid, he had ceased to be a director, owing to his bankruptcy, but he had been appointed manager, and was in fact acting as manager. It is to be

H noticed that, on Sept. 13, when the matter got into the hands of the plaintiffs' solicitors, they wrote to Mr. Rawlings, and in the second paragraph of that letter they said :

Mr. Garner Stevens has explained to us the circumstances in which you have purported to have discharged the amount due by you, and whilst we quite appreciate that in paying Mr. Barber the sums of money which you did you acted in good faith, nevertheless it did not discharge the debt due by you.

There it is clearly put on record that it was realised that Mr. Rawlings had acted throughout in perfect good faith, and furthermore there is no suggestion on the pleadings to the contrary. I have seen Mr. Rawlings, and I am perfectly satisfied that he acted throughout in good faith. He may not have been altogether businesslike, but I am satisfied that he acted in good faith, and, furthermore, that there is no substance in the suggestion that these moneys he paid to Mr. Barber were by way of loan, or had any kind of connection with a bill of exchange which he received from Mr. Barber in connection with the purchase of house property. I think that he paid these cheques honestly to Mr. Barber, thinking and believing that he was discharging his indebtedness to the company, and that Mr. Barber had authority to receive the cheques.

The question is whether by paying Mr. Barber those cheques he in fact discharged himself, as between himself and the company. That raises questions, partly of fact and partly of law, not altogether free from difficulty. In fact, there nearly always is difficulty when one of two innocent parties has to suffer for the fraudulent act of some third person. The company here supplied bricks, and they have not been paid. Mr. Rawlings has had the bricks, and he has paid. The question is whether he has paid the proper person. At one time, Mr. Rawlings used rather vague language with regard to the position which he thought that Mr. Barber occupied. I think that the proper inference to be drawn from Mr. Rawlings' evidence as a whole is this. I think it is quite clear that he knew that there was a limited liability company called Clay Hill Brick and Tile Co., Ltd. I think that it is clear that at all times he knew that that company had some existence in law, that it existed as a legal entity. He says that Mr. Barber told him that he had bought up the company, and, when I recalled Mr. Rawlings into the witness-box and asked him some questions, I think that he really made it clear that he had not applied his mind very clearly to the position. If he had, however, I think that the impression which must have been left on his mind by what Mr. Barber told him was that Mr. Barber owned the company, and, if he had thought what that meant, he would have realised that it meant that Mr. Barber owned all, or substantially all, the shares in the company, that it was to all intents and purpose a one-man company, as so often exists, and that in dealing with Mr. Barber he was dealing with the one and only person in the company who had any authority to do anything at all. I think that Mr. Rawlings honestly believed that. He was undoubtedly deceived by Mr. Barber, and, pursuant to Mr. Barber's request, he made out these cheques in favour of Mr. Barber personally, without thinking anything more about it.

What is the legal result of those facts, as I find them? It is said that Mr. Barber in fact had no authority to receive payment of the cheques in this way, and that, as he had no authority, he was not held out as having any authority, and the payment that has been made is no discharge. As I have already said, at this time, although Mr. Barber did

- not hold in the company quite the position that Mr. Rawlings thought he held, he was none the less, during the time when the cheques were given, the chairman of the directors, and acting as managing director, and, at the time the last cheque was paid, he was actually acting as manager, pursuant to his appointment as such. It may be quite true, no doubt,
- A to say that he had not any specific authority to receive cash. That is to say, nobody had ever told him that he was the proper person to be paid cash. In fact, the company very seldom did receive any cash at all. They were not carrying on a cash business, but on occasions somebody had to be paid cash when the cash was due, and the man who was
- B generally paid cash was a foreman called Holmes, who was authorised to receive small cash payments. Holmes was a man authorised to receive those payments, but Holmes was only a foreman, and, if Mr. Barber, then chairman of the company and managing director, or acting as managing director, had seen Holmes receiving one of these payments, or if Holmes
- C had said to Mr. Barber, "Here, Mr. Barber, is some cash I received to-day, amounting to £3 or £4," could it be said that the chairman of the company, Mr. Barber, had no authority to receive that cash on behalf of the company? It may be that he was not the usual channel through which the company would normally be paid. In a big concern, payments
- D are often made to the cashier or secretary. That is a different thing from saying that the chairman of directors has not authority to receive any cash payment if it is tendered to him.

I think that, on the authority of the cases, and on the law as summarised in the Law Reports in the note to the case of *British Thomson-Houston Co., Ltd. v. Federated European Bank, Ltd.* (1), the cases are

E correctly summarised by the reporter where he says, at p. 184, that the cases show :

- If the articles merely empower the directors to delegate to an officer authority to do the act, and the officer purports to do the act, then—(a) if the act is one which would ordinarily be beyond the powers of such an officer, the plaintiff cannot assume that the directors have delegated to the officer power to do the act; and if they have not done so, the plaintiff cannot recover . . . (b) if the act is one which is ordinarily within the powers of such an officer, then the company cannot dispute the officer's authority to do the act, whether the directors have or have not actually invested him with authority to do it.
- F

- I think that it cannot be said that to receive payment in cash is beyond
- G the power of a managing director or chairman of a company. It may be true that he is not the usual person to receive such sums. They may be received by a woman sitting in an office. However, that is a very different thing from saying that he has not the power to receive them. I think that Mr. Barber, in the position which he held in this company,
- H was an officer who would not be ordinarily empowered to receive a payment of cash, but that, as a result of art. 12 of the articles of the company, which have been put in, as between himself and Mr. Rawlings, he might be so empowered. By art. 12 the directors may delegate to any one of their number or

. . . to any manager, attorney or agent any of the powers, authorities and discre-

tions for the time being vested in the directors . . . any such appointment or delegation may be made in such terms and subject to such conditions as the directors may think fit, and may include a power to sub-delegate, and the directors may at any time remove any person so appointed, and may annul or vary any such delegation, but no person dealing in good faith and without notice of such annulment or variation shall be affected thereby.

I think that the result of that article, the law being as I understand it, is that there being in fact power to confer that authority upon Mr. Barber, A so far as Mr. Rawlings was concerned, it must be taken that he in fact had the authority which he was purporting to exercise—that is, with regard to the receipt of cash.

Of course, it is unusual for anybody acting on behalf of a company to receive a cheque made out to himself personally. The normal, usual and B proper way of receiving payment is, of course, by means of a cheque made out in favour of the company. However, here there was nothing in the documents in this case until after Aug. 3 to put Mr. Rawlings on notice that the proper way of payment was by cheque addressed to the head office of the company, all the documents he had before, I think, C having been headed with the Newbury address. Certainly Mr. Barber's card has no mention at all of a registered London office. He had no notice that payments had to be made in any particular way, and it was at the request of Mr. Barber that the cheques were made out as in fact they were made out. D

I now turn to the decision of McCARDIE, J., in *Bradford & Sons v. Price Brothers* (2), where, according to the headnote, he decided that :

Where the agent of a seller is authorised to receive cash for goods the purchaser who pays the agent by cheque payable to the agent's order is discharged when the E cheque is honoured, notwithstanding that he (the purchaser) has received notice from the seller that all cheques must be made payable to the seller's order.

The basis of that decision is that a cheque in this form—namely, a cheque payable to the agent's order—when it is cashed, is equivalent to cash, and that, therefore, if the agent is authorised to receive payment F in cash, then, if he received a cheque in this form, that is equivalent to cash, and the payer is discharged. It is perfectly true that in this particular case the facts pointed very clearly to the fact—as found by the judge—that the agent in that case was authorised to receive payment in cash. That, of course, is with regard to the facts in that particular case, but the law which is explained in that case is that, if the agent G is authorised to receive payment in cash, then a cheque in this form is equivalent to cash, and discharges the payer. The facts in the present case before me are very different, because, first of all, I have to decide whether as a matter of fact or as a matter of law a person H in the position of Mr. Barber was authorised to receive payment in cash. However, once having come to the conclusion that he was authorised to receive payment in cash, I think that it follows from the decision in *Bradford & Sons v. Price Brothers* (2) that a cheque in this form is equivalent to cash, and therefore that Mr. Rawlings has discharged

the obligations which lay upon him to pay for these goods which he has received. Therefore, in my view, there must be judgment for the defendant on the claim, with costs, and for the defendant for £20 and costs on the counterclaim.

Solicitors: *Thorp, Saunders & Thorp* (for the plaintiffs); *Maude & A Tunnicliffe*, agents for *Louch, Belcher & Co.*, Newbury (for the defendant).

[Reported by GERALD ABRAHAM, ESQ., Barrister-at-Law.]

B REARDON SMITH LINE, LTD. v. EAST ASIATIC CO., LTD.

[KING'S BENCH DIVISION (Branson, J.), **October 18, 1938.**]

Shipping — Charterparty — Demurrage — Exception "Obstructions" — Berths requisitioned by government—Undertaking to provide berth as soon as possible—Whether absolute undertaking.

C A ship was chartered to proceed to one of two ports as ordered by the charterers and there load a cargo. She proceeded to one of the ports, but upon arrival there found that, by reason of certain government requisitions of berths for the landing of troops and stores, there was no berth available where she could load her cargo. The charterparty provided that in the event of "obstructions in the docks or other loading places," the time for loading should not count during the continuance of such causes. In another clause the words "the charterers undertaking to provide an available berth as soon as required" were inserted:—

D HELD: (i) the delay in loading so caused was due to obstructions within the meaning of the clause of the charterparty above referred to and the time thus lost ought to be excluded from the time for loading.

E (ii) the inserted words "the charterers undertaking to provide an available berth as soon as required" did not amount to an absolute obligation to provide a berth in all events.

[EDITORIAL NOTE. The presence of other vessels at all available berths has previously been held to amount to obstruction where the loading of the other vessels had been impeded by a strike. The clause is now held to cover also the case F where the berths are not available through government action—in this case the requisitioning of all available berths for the landing of troops and the supplies for such troops.

AS TO SCOPE OF EXCEPTIONS, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 131-133, para. 216; and FOR CASES, see DIGEST, Vol. 41, pp. 559-565, Nos. 3851-3900.]

G Case referred to:

(1) *Leonis S.S. Co., Ltd. v. Rank (Joseph), Ltd.* (No. 2) (1908), 24 T.L.R. 280; 41 Digest 572, 3959; *affd.*, 99 L.T. 513.

H APPEAL by way of special case stated from the decision in an arbitration in the claimants and the respondents. The facts are fully set out in the judgment.

A. A. *Mocatta* for the claimants, the shipowners.

W. L. *McNair* for the respondents, the charterers.

BRANSON, J.: The claimants' ship, the Santa Clara Valley, was chartered to the respondents by a charterparty dated Sept. 18, 1937,

to proceed to Dairen or Rashin, as ordered by the charterers, and there to load a cargo of soya beans. She went to the port of Dairen, and, when she arrived there, she found that, owing to certain government requisitioning of ships, and of quay space, there was no berth where she could go to load her cargo. First of all she was kept waiting for a day or two before she could go alongside, and, having got alongside, at a subsequent A period she was ordered away from the berth by the government authorities, and was unable to return for another period of days. In the circumstances, the claimants claimed demurrage, which the respondents declined to pay. Since the charterparty contained an arbitration clause, the matter was arbitrated, and I am now dealing with the special case B stated by the umpire raising a question of construction upon the charterparty.

The point lies in a very small compass. Clause 7 of the charterparty reads as follows :

Charterers to be allowed one lay-day (Sundays and gazetted holidays excepted) for every 600 tons for loading the steamer at port of loading. Lay-days at port of loading to be weather working days and to commence 24 hours after the steamer is dunnaged matted and all hatches are ready for cargo whether in berth or not and of the captain having given written notice (within business hours 10 a.m. to 5 p.m. : Saturdays 10 a.m. to 2 p.m.) to that effect to charterers or their agents. C

Then cl. 11, which is the one relied upon by the charterers, reads as D follows :

Any time lost at port or ports of loading and discharging through riots, detention by ice, time occupied shifting ports or berths and time lost by inability of steamer to load and discharge as above not to count as lay-days. If the cargo cannot be loaded by reason of riots civil commotions . . . or by reason of obstructions or stoppages beyond the control of the charterers on the railways feeding the port or ports of loading or in transit or in the docks or other loading places . . . the time for loading . . . shall not count during the continuance of such causes. . . . In the case of any delay by reason of the before-mentioned causes no claim for damages or demurrage shall be made by the charterers receivers of the cargo or owners of the steamer. For the purpose however of settling despatch money accounts any time lost by the steamer at loading and/or discharging port or ports through any of the above causes shall be counted as time used in loading and/or discharging. E F

What is said by the charterers is that the state of affairs found by the umpire to have existed within the port amounted to "obstructions in the docks or other loading places," and that it consequently prevented the time from running against them. The case finds that the delay in the commencement of the loading arose as a consequence of the charterers G not being able to obtain a berth, because until Nov. 10, all the berths available for vessels not employed by the government were occupied by other mercantile vessels, which were entitled to be loaded or discharged before the Santa Clara Valley. The reason for this congestion of vessels was that the authorities had requisitioned for the discharge of ships H carrying troops and military stores a number of berths normally available for mercantile vessels, thus reducing the number of berths available for mercantile vessels, which were therefore obliged to wait longer for a berth than they otherwise would have been, and the charterers say that that amounted to an obstruction within the meaning of cl. 11.

In upholding that contention, the umpire referred to *Leonis S.S. Co., Ltd. v. Rank (Joseph), Ltd.* (No. 2) (1). That case related to a similar question arising upon a clause in a charterparty which, though not *verbatim* the same as the one with which I have to deal, seems to me to be so essentially similar in all its material parts that the construction placed by the court upon the charterparty in that case ought, in my view, to bind me in deciding the construction to be put upon the charterparty in this case. Clause 39 in the charterparty in that case provided as follows :

If the cargo cannot be loaded by reason of riots . . . or through obstructions on the railways or in the docks or other loading places beyond the control of charterers, the time lost not to be counted as part of the lay-days.

It was decided by BIGHAM, J., as he then was, that that clause relieved the charterers from liability in that case, the delay having arisen owing to the fact that the berths which might otherwise have been available to the *Leonis* were occupied by other ships, so that the charterers were therefore unable to put their goods on board. I do not think that it is necessary for me to refer in detail to the judgment of BIGHAM, J., nor to the judgments of the Court of Appeal. VAUGHAN WILLIAMS and BUCKLEY, L.JJ., both agreed with the construction put upon cl. 39 by BIGHAM, J., and FLETCHER-MOULTON, L.J., without dissenting from that construction, based his decision upon another point which was taken.

The situation then is that, unless there be some material difference between the language of this charterparty and the language of the charterparty in that case, I am bound to put upon the words in this charterparty, which are the same, the same construction as that which the courts put upon the words in the charterparty in the *Leonis* case (1).

Mr. Mocatta attempts to differentiate the two cases by reference to two other clauses in this charterparty. He relies, first of all, upon the fact that in cl. 7 there are the words "whether in berth or not," and he says that that shows that the finding of a berth is made a matter entirely for the charterer, and that the charterer, in reply, undertakes the liability of it. To my mind, that clause can have no effect upon the construction to be put upon the exceptions in cl. 11. All that that clause is doing is to indicate the time at which a notice of readiness shall be given in order to fix when the lay-days shall commence to run, and what it is saying is that that notice may be given, whether the ship is in berth or not. The existence of that clause cannot, to my mind, have any effect in enabling me to put upon the exceptions clause any construction different from that which was adopted in *Leonis S.S. Co., Ltd. v. Rank (Joseph), Ltd.* (No. 2) (1).

The other point which Mr. Mocatta urges is on cl. 15 of the charterparty, which provides that the lay-days at the port of loading are not to commence before Oct. 20 unless the charterers wish to begin sooner. Clause 15 continues :

. . . and if the steamer be not arrived at her loading berth at port of loading (charterers undertaking to provide an available berth as soon as required), or although

arrived be not in every way fitted for cargo (as per cl. 1) and/or ready for same (as per cl. 7) on or before noon of Nov. 10 [then the charterers are to have an option for cancelling].

Mr. Mocatta seeks to use the expression in that clause, "charterers undertaking to provide an available berth as soon as required," as though it applied to the charterparty generally. In my view, those words are apt in the context in which they occur, and they fit in to cl. 15, where the question which is being dealt with is the time at which a right to cancel shall arise in the charterers. Also, of course, the charterparty very reasonably provides that, before a right to cancellation can arise in the charterers, the charterers must have provided an available berth into which the ship could go. I think that it would be giving very undue effect to those words to take them out of the context in which they appear and to treat them as importing a general obligation upon the charterers at all events to provide a berth. This is clearly not what the charterparty means, and would, as it seems to me, wipe out all the exceptions in cl. 11, whatever construction is put upon them, if it were a correct interpretation of the charterparty. For these reasons, I think that the award should be affirmed, and the charterers are to have the costs of the argument.

Solicitors: *Holman, Fenwick & Willan* (for the claimants, the ship-owners); *Thomas Cooper & Co.* (for the respondents, the charterers).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

R. v. WEST DERBY ASSESSMENT COMMITTEE, *Ex parte* MERSEY DOCKS & HARBOUR BOARD AND LIVERPOOL RATING AUTHORITY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, J.J.), **October 21, 1938.**]

Rates and Rating—Valuation list—Proposed amendment of current valuation list affecting various hereditaments—"Notice must be given to the occupier"—Whether occupier of whole undivided hereditament entitled to notice of proposed amendment affecting notional hereditaments of parts of whole—Rating and Valuation Act, 1925 (c. 90), s. 37 (1), (3), (7).

A rating authority proposed to amend the current valuation list for the purpose of separately assessing let-out property which formed part of the existing *cumulo* assessment of the undivided hereditament. No notice of the proposal was given to the existing occupier of the undivided property, on the ground that notice had been given to the occupier of the notional hereditament which it was proposed to carve out of the undivided whole, and that there was no statutory obligation to give notice to more than one occupier. The applicant contended that the assessment committee had no jurisdiction to hear or determine the proposed amendment unless notice had been previously given to the applicant so that the matter should not be dealt with in the absence of the applicant:—

HELD: as the applicant was an "occupier" within the meaning of the Rating and Valuation Act, 1925, s. 37 (3), whose rights and property might be vitally affected by decisions of the assessment committee in

his absence, the assessment committee had no jurisdiction to hear and determine the proposed amendment unless due notice was previously given to the applicant.

[EDITORIAL NOTE.] This case is in no way concerned with the appropriateness of the writ of prohibition as the remedy in such a case, and the only matter discussed is the meaning to be given to the word "occupier" in the Rating and Valuation Act, 1925, s. 37. The circumstances are a little exceptional. A dock authority had for a long time been rated in respect of the whole of the dock premises as one hereditament, and it was proposed to carve out a number of separate hereditaments, each one being that part of the dock property which was let to a separate shipping company. In accordance with the practice under the Act, a proposal to amend the valuation list was made, and the dock authority contended that they were entitled as of right to be represented at the consideration of the proposal. The assessment committee, however, contended that they were not an "occupier" within the meaning of that word as used in sect. 37.

AS TO OCCUPIER FOR RATING PURPOSES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 478-480, para. 910; and FOR CASES, see DIGEST, Vol. 38, pp. 582, 583, Nos. 1159-1169.]

APPLICATION to make absolute a rule *nisi* for a writ of prohibition to prohibit the West Derby Assessment Committee and the rating authority for the county borough of Bootle from proceeding with proposals to amend the current valuation list for the county borough of Bootle rating area in respect of certain berths, sheds and appendages, upon the ground that the assessment committee had no jurisdiction to hear or determine the proposals.

Up to the date of the proposals the subject of this application, the property of the Mersey Docks and Harbour Board had been included in one assessment, referred to as a *cumulo* assessment. The rating authority proposed to assess various parts of the property separately and to treat as the occupier of each part the shipping companies to which these parts (consisting of berths, sheds and other dock property) were let out. For this purpose, a proposal for the revision of the current valuation list was made, and the Mersey Docks and Harbour Board applied to be represented at the consideration of the proposal. The assessment committee refused to allow them to be represented, upon the ground that they had no *locus standi* in the matter. It was contended that the relevant section of the Rating and Valuation Act, 1925, speaks of only one occupier of the premises to be rated, and that, in the present case, that occupier was the shipping company concerned, and not the Mersey Docks and Harbour Board. Thereupon the Mersey Docks and Harbour Board applied for a writ of prohibition.

A. S. Comyns Carr, K.C., and Hartley Shawcross for the rating authorities showed cause against the rules.

G. Justin Lynskey, K.C., and H. I. Nelson for the Mersey Docks & Harbour Board in support of the rules.

Hartley Shawcross for West Derby Assessment Committee.

Michael Rowe for the Cunard White Star Co., Ltd., and other shipping companies in support of the rules.

LORD HEWART, L.C.J. : This is a rule *nisi* for a writ of prohibition for the purpose of prohibiting the assessment committee of the West Derby assessment area and the rating authority for the county borough of Bootle rating area :

... from proceeding with proposals to amend the current valuation list for the county borough of Bootle rating area, in respect of berths, sheds and appendages [in the Gladstone Dock appropriated to a series of shipping companies] upon the ground that the said assessment committee has no jurisdiction to hear or determine the said proposals. A

It is quite obvious that the question which is raised here is a question vitally affecting the position of those at whose instance the rule was obtained—namely, the Mersey Docks and Harbour Board. B

The provisions of the law relating to the proposals for the revision of current lists are, one would have thought, reasonably plain. The Rating and Valuation Act, 1925, s. 37 (1), provides that any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list may make a proposal for the amendment of the list in certain circumstances. Then sect. 37 (2) lays down the conditions under which such a proposal may be made? C

Every proposal made under this section must (a) be made in writing and, except where it is made by the rating authority, be served on the rating authority ; (b) specify the grounds on which the proposed amendment is supported. D

Then sect. 37 (3) contains this precise provision :

The rating authority shall, within seven days after the date on which the proposal is made by or served on them, transmit a copy thereof, in the case of a proposal made otherwise than by the occupier of the hereditament to which it relates, to the occupier, or, where there is no occupier, to the owner thereof, and shall not less than twenty-one days before the date of the meeting at which the proposal will be considered by the assessment committee, transmit to him a notice of the date on which the meeting aforesaid will be held and a short statement of the effect of the next following subsection of this section. E

Then sect. 37 (4) provides as follows :

Any person to whom a copy of a proposal is transmitted as aforesaid may, if he thinks fit, give to the rating authority notice in writing of objection to the proposal, and unless he gives such notice, he shall not be entitled to be heard at the meeting in opposition to the proposal. Any such notice as aforesaid must be given not less than seven days before the date on which the meeting for considering the proposal is to be held and must state the grounds of the objection. F

Then sect. 37 (5) is as follows :

The rating authority shall forthwith transmit to the person by whom a proposal is made a copy of any notice of objection thereto which has been received by them, and if they themselves intend to object to the proposal, shall forthwith give to that person notice of their intention and of the grounds of the objection. G

Then by sect. 37 (7) it is provided that the assessment committee H

... shall hear and determine any proposal as if it were an objection to a draft list, and all the foregoing provisions of this part of this Act relating to the hearing and determining of such an objection shall apply accordingly.

Then there is provision in a proper case for an appeal. What happened

here in fact was this. A series of proposals was contemplated for the purpose of affecting the assessment of various hereditaments—not one hereditament, but a whole series of them. The method which was adopted was that each one of these separate hereditaments—notional hereditaments, in the sense that they were, at the moment referred to, A part of a very much larger whole—should be dealt with, leaving aside the Mersey Docks and Harbour Board, who were interested in the at-present-undivided hereditament. The grounds upon which the proposed amendment in the current valuation list was suggested were that, in the opinion of the rating authority, this property should be separately B assessed, that the property was let-out property, and that the assessment thereof should not be included in the *cumulo* assessment of the Mersey Docks and Harbour Board estate.

The provision in the statute is perfectly clear—namely, that the rating authority must, within the period named, transmit a copy of the C proposal to the occupier “in the case of a proposal made otherwise than by the occupier of the hereditament to which it relates. . . .” The question is who, in the circumstances of this case, was properly to be called the occupier.

The argument for the assessment committee and the rating authority D proceeds upon the assumption that the only occupier referred to—and therefore the only occupier to whom the notice alluded to need be given—is an occupier of the notional or potential hereditament which it was proposed to carve out of the undivided whole. The answer of those who obtained this rule—the Mersey Docks and Harbour Board—was E that that is quite a fictitious mode of regarding the facts of the case. The proposals relate not less to the undivided whole than to the notional part. The Mersey Docks and Harbour Board complain that questions affecting—it may be vitally affecting—their enormous hereditament were to be dealt with behind their backs, and that that which is at F present an undivided whole was to be parcelled out and treated *seriatim* as a series of unrelated parts. In other words, it is contended that it is inaccurate, in the circumstances of this case, to speak of merely one occupier. There may be really, on the true view of the matter, two occupiers. Moreover, if the contention that we are to look only at the G undivided whole is supported, then the Mersey Docks and Harbour Board had a real interest in the matter. I have listened with care and attention to the ingenious argument of Mr. Comyns Carr, but it seems to me to ignore the plain provisions of this section. I cannot think that the hereditament to which the proposal relates can truly be regarded H as a merely notional hereditament, which it is intended, on the happening of a certain event, to bring into being, to the neglect of the whole hereditament, of which the notional hereditament at present forms part. I think that the rating authority contemplated dealing with a large series of cases affecting the value of property of the Mersey Docks and Harbour Board. After attention had been pointedly drawn to the nature of

what was being done, or contemplated, the assessment committee persisted in its scheme. If that scheme were persisted in, it seems to me that there would be, or might be, decisions behind the backs of the Mersey Docks and Harbour Board which would vitally affect their rights and their property.

There is much more which might be added upon the facts and implications of this interesting case, but I refrain. It is clear to me that what was contemplated was a course which may well be prevented by the prerogative writ of prohibition. I think that the Mersey Docks and Harbour Board were well justified in coming here to prevent, before it is too late, a very grave interference with their rights. In my opinion, this rule should be made absolute. A
B

CHARLES, J.: I agree with all that has fallen from LORD HEWART, L.C.J. I only desire to say that it appears to me to be an extremely short point, depending upon the true interpretation of the Rating and Valuation Act, 1925, s. 37 (3). One has also to take into consideration sect. 37 (7), where one finds what the position of the assessment committee is. The assessment committee C

... shall hear and determine any proposal as if it were an objection to a draft list, and all the foregoing provisions of this part of this Act relating to the hearing and determining of such an objection shall apply accordingly. D

There are certain conditions which are laid down in subsect. (3) of that section which must be fulfilled before the assessment committee have any jurisdiction at all to hear and determine any proposal which is brought before them. The conditions precedent to their jurisdiction are really conditions relating to notice. The purpose of the section, which is very clear indeed, is to insure that those interested are brought before the assessment committee properly upon notice. E

It has been argued by Mr. Comyns Carr that, such notice having been given to certain shipping companies, those shipping companies being within the area of the property of the Mersey Docks and Harbour Board, no notice should be given to the Mersey Docks and Harbour Board, however much they are interested, because the subsection refers to one occupier, and not to two occupiers. When one comes to look at the position in this case, however, it is perfectly clear that, when the subsection says "notice must be given to the occupier," it means to the occupier who is interested, and in this case there are two occupiers. The position in fact is a very simple one. Heretofore the Mersey Docks and Harbour Board have been upon the valuation list as occupiers of the whole area of the property of their undertaking. The proposition is to treat certain berths, 43 in Liverpool and 18 in Bootle, as let-out properties, which ought not to be included in the *cumulo* assessment of the Mersey Docks and Harbour Board estate, but ought to be separately assessed. That proposal envisages the construction of certain new hereditaments carved out of the main hereditament which is at present in the occupation F
G
H

of the Mersey Docks and Harbour Board. They are only potential in their character. They are non-existent. It is a proposal. However, there is in existence an occupier of these very hereditaments, though not of those hereditaments by name and by separation, for they are included within the area of the dock estate. The Mersey Docks and Harbour Board, I think very naturally, say: "Heretofore we have been treated as occupiers. You propose to carve up this estate for rating purposes, and we are vitally affected by this proposal. We are in occupation. We claim that notice must be given to us as an occupier, and, if notice is not given to us, we say to you, the assessment committee, that you have no jurisdiction to hear and determine the proposals." The assessment committee were made aware, in the clearest terms, of the attitude taken up by the Mersey Docks and Harbour Board, but they rejected the contention, and indicated that it was their intention to proceed in the absence of the Mersey Docks and Harbour Board, for they would have no *locus standi* at all, unless notice was given to them as the statute directs it shall be given. So the matter comes before this court, as I think everyone must agree, quite in the proper form. The assessment committee have said, in spite of the contention which was put forward by the Mersey Docks and Harbour Board: "We intend to go on." The Mersey Docks and Harbour Board come here and say to this court: "Will you stop them from going on?" I think that this rule should be made absolute.

MACNAGHTEN J.: I am of the same opinion. I have very little to add. In spite of the able argument of Mr. Comyns Carr, it seems to me to be a very plain case. The rating authority, by reason of the Rating and Valuation Act, 1925, s. 37 (3), were bound to give notice of the proposals that they were making to the occupier of the hereditament to which the proposals related. So says the section, and it is difficult to see how those words can be construed in other than their plain sense. If so, the only question is: Did the proposal relate to a hereditament of which the Mersey Docks and Harbour Board were the rated occupiers? The proposal itself shows that it did, because the ground on which the proposal was made was that in each case the property in question ought not to be said to be included in the assessment of the Mersey Docks and Harbour Board estate, plainly implying, as the fact is, that it was included in that assessment. It seems to me, therefore, impossible to argue that the Mersey Docks and Harbour Board were not entitled to have notice of the proposal. Whether the various shipping companies could answer the description of "occupiers of a hereditament" in sect. 37 (3) I think is open to some doubt. I think that, when the section provides for a revision of the current list, it is open to argument that the word "hereditament" in sect. 37 (3) is referring to a hereditament as it appears in the rate book, and not to some potential, contingent or hypothetical hereditament, which may come into existence

if the proposal made by the rating authority succeeds. I agree that this rule for a writ of prohibition should be made absolute.

Rules made absolute.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Harold Partington*, Town Clerk, Bootle (for Liverpool and Bootle rating authorities); *Gregory, Rowcliffe & Co.*, agents for *E. A. Moorhouse*, solicitor to Mersey Docks and Harbour Board, Liverpool (for the Mersey Docks and Harbour Board); *T. J. Smith & Son*, Liverpool (for West Derby Assessment Committee); *Hill, Dickinson & Co.* (for Cunard White Star Co., Ltd., and others).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

WALTERS v. WRIGHT.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), October 24, 1938.]

Agriculture—Worker's minimum wage—Whether poultry-farming within definition of "agriculture"—Agricultural Wages (Regulation) Act, 1924 (c. 37), s. 16.

By the Agricultural Wages (Regulation) Act, 1924, s. 16, it is provided that "the expression 'agriculture' includes dairy farming, and the use of land as grazing, meadow or pasture land or orchard or osier land or woodland or for market gardens or nursery grounds." The respondents occupied a poultry farm where the grass land was kept solely for the purpose of poultry breeding and poultry rearing. They employed on the poultry farm a general worker, whose wages were below the minimum rate fixed by the Agricultural Wages (Regulation) Act, 1924. The respondents were charged with so employing the worker at those wages, contrary to the provisions of the Act of 1924. The respondents contended that, as poultry farming was not agriculture within the meaning of the Act, the worker was not employed in agriculture for the purposes of the Act. The justices upheld this contention and dismissed the charge. Thereupon this appeal was brought:—

HELD: as grass land must necessarily contribute to a material degree either to the nourishment or to the health of the poultry, the poultry farm was a use of land for the purpose of husbandry, and the worker was therefore employed in agriculture.

[EDITORIAL NOTE. The question at issue here was recently before BRANSON, J., in *Re Stephens and Branthwaite and Otway*, [1938] 3 All E.R. 311, where the question was whether an employee upon a silver fox breeding farm was employed in agriculture. In the present case, the particular kind of farming in question is poultry farming, and, it having been previously decided that the breeding of silver foxes is agriculture, it seems *a fortiori* that poultry breeding must fall within the same category, for poultry breeding, if not as a farming operation by itself, has long been an integral part of the farmer's work.

AS TO WORKERS EMPLOYED IN AGRICULTURE, see HALSBURY, Hailsham Edn., Vol. 1, p. 392, para. 667; and FOR CASES, see DIGEST, Vol. 44, pp. 1301, 1392, Nos. 63-70.]

Cases referred to:

- (1) *Lean v. Inland Revenue*, [1926] S.C. 15; Digest Supp.; *sub nom. Lean & Dickson v. Ball*, 10 Tax Cas. 341.
- (2) *Lanarkshire Assessor v. Smith*, [1933] S.C. 366.

APPEAL by way of case stated from a decision of the justices sitting at Wetherby, Yorks.

Hubert Hull for the appellants.

The respondents did not appear.

A LORD HEWART, L.C.J. : This is a case stated by justices, and it arises out of an information preferred under the Agricultural Wages (Regulation) Act, 1924. The point was that it was alleged that a certain person, a worker in agriculture, was not paid wages at a rate not less than the minimum rate as fixed under the Act of 1924 and the relevant orders. The justices, having heard the information, dismissed it, and the question B is whether, in so doing, they came to a correct determination in point of law.

In my opinion, after listening to the admirable argument of Mr. Hull, it is apparent that these justices did not come to the correct conclusion. It is not necessary to reiterate in full the case which was heard. It is C found as a fact that the respondents occupied a holding known as Moor-side Poultry Farm, East Keswick, and that they there carried on what is called the business of poultry farming. The extent of the holding, we are told, was about $7\frac{1}{2}$ acres of grass land, of which about 4 acres were not in use at the time of the alleged offence. The stock, it is said, varied D according to the season, but at the busy season there were 2,500 young chickens on the holding. No other stock except the poultry was kept, nor was any other business carried on upon the holding. The question, in those circumstances, was whether it was true to say that the man whose wages were being referred to was a person employed in agriculture E within the meaning of the statute.

The case finds as a fact that at all material times the duties of this man were the duties of a general worker on a poultry farm, and, in particular, he was employed in giving care and attention to the poultry. He prepared their food, fed and watered them, and cleaned out and F repaired the poultry houses and runs. He also attended to the incubators, and killed and prepared poultry for sale for domestic consumption. Upon the facts, it was contended that this man was at all material times employed in agriculture for the purposes of the Agricultural Wages (Regulation) Act, 1924. *Per contra*, the respondents contended that G poultry farming was not agriculture within the meaning of the Act, so that this man was not employed in agriculture for the purposes of the Act. In that controversy, the justices came to the conclusion that Hamlin was not employed in agriculture.

This Act of Parliament, as sometimes happens, refrains from setting H out a definition, which perhaps might be difficult to set out. Instead, when we come to sect. 16 of the Act, we find these words :

(1) In this Act unless the context otherwise requires, the expression " agriculture " includes dairy farming and the use of land as grazing, meadow, or pasture land or orchard or osier land or woodland or for market gardens or nursery grounds.

That definition obviously does not purport to be an exhaustive definition.

It is not even a definition by simple enumeration. It seems rather to be a definition partly, at any rate, by means of specific illustrations or examples. The question is, I think, whether the meaning of the legislature is made sufficiently plain in that defining section to make it reasonably clear that, for the purposes of this Act, though it may not read exhaustively for all purposes, poultry farming comes under the A denomination of agriculture.

I am satisfied, after considering the judgments in the two Scottish cases, to which our attention has been directed—namely, *Lean v. Inland Revenue* (1) and *Lanarkshire Assessor v. Smith* (2)—that agriculture is, for the purpose of this Act, to be taken as including poultry farming. I B need not read the whole of the judgment of LORD HUNTER in the second case. He referred to the earlier case of *Lean v. Inland Revenue* (1), and added these observations, at p. 371 :

The reasoning of the judges in that case appears to me to support the view that the use of lands for the purpose of poultry-breeding, as described in the present case, C is an agricultural use of lands as that expression is generally understood.

The following words were used by LORD SKERRINGTON, in *Lean v. Inland Revenue* (1), at p. 20.

..... what is popularly known as a poultry farm is *prima facie* land which is occupied D for the purposes of husbandry.

In the same case, LORD SANDS said, at p. 20 :

Now, I quite agree with the view that in order that this should be accounted as husbandry there must be a contribution by the land as grass land to a material degree either to the nourishment or to the health of the poultry. One might put it generally that it must be the fruits which contribute, but I think "fruits" may be liberally construed, and that insects and grubs which are only found in grass land may be E regarded as part of the fruit of that land.

In the later case, *Lanarkshire Assessor v. Smith* (2), LORD SANDS, delivering a separate judgment and expressing his agreement with the judgment of LORD HUNTER, said, at p. 371 :

It is well settled, I think, that the term "agriculture" in a statute is not to be construed in a manner which circumscribes its ambit etymologically. It includes the various uses of the land which, popularly and historically, are associated with farming. I doubt if in 1895 there were many poultry farms in Scotland. But poultry have from time immemorial been associated with farming—witness the expressions "barn door fowl" and "cock on his own midden." Down to within living memory farmers in some parts of the country paid part of their rent in "kain hens." I say living memory, for as a child I have helped to count a consignment from a farm of kain hens. Under modern conditions it has been found profitable in many cases greatly F to extend this branch of the farming industry, and even to make it exclusive. But I do not think that this alters its character as a use of the land traditionally associated with the farm. G

Mr. Hull has made bold to contend before us that, for the purposes, at any rate, of this legislation, "agriculture" includes any use of land in connection with breeding or keeping any animal ordinarily found on a H farm. I think that there is much to be said for that definition, and I certainly think that, regard being had to the authorities which have been cited to us, so far as poultry farming is concerned, the definition contained in the Act of 1924 is wide enough to include it under the head

of "agriculture." It is found in the case that, if the person referred to—namely, Hamlin—was employed in agriculture, the arrears of wages due to him for the period from Apr. 26, 1936, to Feb. 12, 1938, amount to £33. Then this court is asked, on the facts of the case stated, to decide whether the determinations of the justices were correct in point of law, and, if not, to reverse or amend the determinations, or remit the matter to the justices with the opinion of the court. I think that it is apparent that the decision ought to have been in favour of the man who was employed, and that the necessary consequences with regard to the arrears of wages must follow.

CHARLES, J. : I agree. I confess that at the commencement of this case I felt some real doubt as to whether or not this man Hamlin was a worker in agriculture, but, having had my attention called to the decision in *Lean v. Inland Revenue* (1), and to the further decision in *Lanarkshire Assessor v. Smith* (2), I feel quite certain that the view taken by LORD HUNTER, LORD SKERRINGTON, LORD SANDS and LORD FLEMING in those cases shows that a man working upon a poultry farm of this nature is a worker in agriculture. In *Lanarkshire Assessor v. Smith* (2), LORD FLEMING, in referring to *Lean v. Inland Revenue* (1), said at p. 372 :

There a poultry farm, of much the same character as those under consideration in this case, was held to fall within the definition of "husbandry" in the income tax statutes. The ground of decision was that the poultry keeping and poultry rearing there in question depended to a material extent upon the fruits of the land occupied. That ground of decision applies in the present case, and I think we ought to follow *Lean* (1). It seems to me impossible to draw any real distinction between this case and a sheep farm where no part of the ground is cultivated.

In this case, this grassland was kept simply and solely for the purpose of poultry-breeding and poultry-rearing, and I am impressed by the view expressed by LORD SANDS in *Lean's* case (1), that grassland must of necessity contribute to a material degree either to the nourishment or to the health of the poultry. That being so, I have come to the conclusion that the carrying on of this poultry farm is a use of land for the purpose of husbandry, and that Hamlin in this case must be regarded as a worker in agriculture.

MACNAGHTEN, J. : I am of the same opinion. I only desire to add that I also think that the definition of "agriculture" propounded by Mr. Hull is correct, though it may not be exhaustive.

Appeal allowed.

Solicitor : A. D. Stocks, Official Solicitor, Ministry of Agriculture and Fisheries (for the appellants).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

Re JEFFERYS, FINCH *v.* MARTIN.[CHANCERY DIVISION (Farwell, J.), **October 19, 1938.**]

Settlements—Settled land—Trustees having power of sale with consent of annuitant—Trustees also statutory owners—Inconsistency of two powers of sale—Statutory power only exercisable—Settled Land Act, 1925 (c. 18), s. 108 (1).

The testator gave the residue of his estate in trust to pay out of the income thereof to M. an annuity, subject to certain conditions. He gave to his trustees a power to sell his residuary estate, or any part thereof, during the lifetime of the annuitant, but only with the annuitant's consent. After any such sale, the trustees were to hold the proceeds of sale and the balance of the income accumulated during the annuitant's lifetime, and the interest thereon, in trust to divide the same between certain named hospitals. Upon application to the court, it was held that, upon the proper construction of the will, the proceeds of any sale were immediately distributable among the named hospitals. The testator having died on June 15, 1912, the power to accumulate the surplus income ceased, and the question arose as to the destination of the unapplied income accruing after that date, which could not be accumulated:—

HELD: (i) as there was no tenant for life of the settlement created by the will, the trustees were statutory owners, and, as such, had a power to sell any land included in the residuary estate. This power of sale was inconsistent with the power to sell with the consent of the annuitant given to the trustees by the will. As from Jan. 1, 1926, the only effective power of sale was that under the Settled Land Act, 1925, and the proceeds of any sale after that date were capital moneys, subject to the trusts of the settlement. As the accumulation of surplus income became impossible after June 15, 1933, such income was undisposed of by the will, and passed as capital moneys on an intestacy.

(ii) the words "or otherwise" in the Settled Land Act, 1925, s. 108 (1), mean something which the tenant for life is to do or abstain from doing, and do not refer to the consent or request of some person other than the tenant for life.

[EDITORIAL NOTE.] The main contest here is whether the power of sale given by the Settled Land Act, 1925, to statutory owners is inconsistent with a power given by the settlement, the latter power being only exercisable with the consent of the tenant for life or any other party. Upon this, it is decided that the statutory power is an overriding power, and, therefore, there is an inconsistency, and the power to sell with consent becomes inoperative. Apart from this main contest, there is a number of subsidiary points of more or less interest. The effect of a conveyance of settled land before the execution of a vesting deed is discussed, but, perhaps, not definitely decided. The Settled Land Act, 1925, s. 108, is, however, very carefully considered. The first subsection of this section preserves subsisting powers under a settlement exercisable by the tenant for life or by trustees "with his consent, or on his request or by his direction or otherwise." It is with regard to the last words that different views are urged, and the question is whether these words are referable only to some act to be done by the tenant for life, or whether they include a reference to acts done by other persons. The solution to this problem is not made easier by the fact that these words are followed by the expression "and the powers given by this Act are cumulative." It is held, however, that they can refer only to an act done by the tenant for life, and do not extend, in the particular case here argued, to the consent of an annuitant.

AS TO CONFLICT BETWEEN SETTLEMENT AND STATUTORY PROVISIONS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 749, 750, para. 1044; and FOR CASES, see DIGEST, Vol. 40, pp. 766-768, Nos. 2980-3003.]

ADJOURNED SUMMONS. Previous proceedings in respect of the same will are reported [1936] 2 All E.R. 626, where the facts are fully set out

The plaintiffs were two of the executors and trustees of the will of Edward Wilkinson Jefferys, dated June 17, 1902, together with codicils dated respectively July 17, 1903, Oct. 4, 1905, Oct. 30, 1906, and June 17, 1909, and asked for the determination of the following questions :—

- Whether (a) as regards the proceeds of the sale of the parts of the testator's real estate which were sold between Dec. 31, 1925, and June 16, 1933, and the accumulations of the income of such proceeds of sale, and 'b) as regards the proceeds of any sales of the testator's real estate which may be made after the date of this summons, such proceeds of sale and (in case (a) above) such accumulations of income ought to be forthwith divided amongst such of the London hospitals situate within the Administrative County of London as the trustees for the time being of the will and codicils shall select, or whether such proceeds of sale and accumulations ought to be retained by the trustees and the income thereof as from June 15, 1933, or (in case (b) above) as from the date when such proceeds shall be received by such trustees should be paid to the testator's heirs in gavelkind, or for whom and upon what trusts such proceeds of sale and accumulations and the income accrued or to accrue from such proceeds of sale and accumulations ought to be held from time to time.

G. A. Rink for the plaintiffs, two of the executors and trustees of the will.

J. A. Reid for the first defendant, an executor and a beneficiary.

Herbert Hart for the second defendants, the heirs in gavelkind.

- E. J. W. Brunyate (with him A. Andrewes-Uthwatt) for the third defendant, the Attorney-General.

- FARWELL, J. : This summons raises what, to my mind, is a very difficult question. The question arises in these circumstances. The testator, Edward Wilkinson Jefferys, made his will on June 17, 1902, and he died on June 15, 1912. By his will he appointed executors, and, after certain directions which it is not necessary for me to read, he gave the whole of his residue real and personal to his trustees upon trust, out of his ready money and life insurance and so on, to pay his funeral and testamentary expenses :

- ... and upon trust to stand possessed of my real estate and all the residue of my personal estate in trust out of the income thereof to pay to the said George Alfred Martin during his life the annual sum of £300 subject to his paying thereout all sums necessary for keeping my properties in good substantial repair and condition and insured and to his paying all rates and taxes and outgoings in respect of such properties not payable by the tenants thereof and I declare that my trustees shall stand possessed of my real and personal estate from and after the death of the said George Alfred Martin upon trust to sell the same and to stand possessed of the net proceeds thereof and the balance of the income accumulated during the lifetime of the said George Alfred Martin and the interest thereof in trust to divide the same [between certain named hospitals]. I declare that as regards any real or leasehold property remaining unsold my trustees shall be at liberty to let or demise the same either from year to year or for any term of years. . . . I also authorise my trustees at any time or times with the consent in writing of the said George Alfred Martin during his life should in their discretion it be found

expedient so to do to sell the whole or any parts of my said real and leasehold property and to stand possessed of the net proceeds of any such sale upon the trusts and subject to the powers and provisions herein declared and contained of and concerning the net proceeds of the sale of my residuary real and personal estate after the death of the said George Alfred Martin.

The testator made in fact more than one codicil to his will, in one of which he revoked the gift of £300 per annum to George Alfred Martin and gave him in lieu thereof an annuity of £150 on certain conditions. I think that none of the other codicils is relevant to anything which I have to determine. As I have said, the testator died in 1912, and the trustees proceeded—properly, of course—to pay to him the annuity to which he was entitled. Then they also proceeded, in accordance with the terms in the will, to accumulate the balance of such income. From time to time portions of the real estate were sold, and they were sold in all cases by the trustees in exercise of the power contained in the will, with the consent of Mr. Martin. The effect of the will was that there was no trust for sale and no power of sale, so far as the real estate was concerned, so long as George Alfred Martin was alive, except with his consent. As the result of an order made by this court in earlier proceedings upon the true construction of the will, the effect of a sale under that power with the consent of Mr. Martin was that the proceeds of sale had to be dealt with as though George Alfred Martin were dead, with the result that the money was distributable at once among the selected hospitals as being the persons entitled to residue. That was the effect of a sale made by the trustees with the consent of Mr. Martin. The purpose for which Mr. Martin's consent was thought necessary by the testator before any power of sale could be exercised is obvious, and the object of it was quite clearly for the protection of Mr. Martin. If the trustees sold and the proceeds of sale were to cease to be the security, or part of the security, for Mr. Martin's annuity, and were to go to the residuary legatees at once, it is obvious that that might prejudice Mr. Martin. Thus, the consent of Mr. Martin to such a sale was a reasonable, and, as it seems to me, a proper, arrangement to make. There have been sundry sales in the past, presumably with Mr. Martin's consent. He has been content to allow certain portions of the property to go, and to rely on the remaining property as representing sufficient security for the payment of the annuity which fell to him.

No difficulty arose down to 1933, but on June 15, 1933, by virtue of the Act which is familiar to me as the Thellusson Act, the direction to accumulate ceased by reason of law. June 15, 1933, was the date of the expiration of 21 years from the death of the testator, and as from that date any further accumulations became illegal. The question therefore arises as to the destination of the accumulations from the property as from that date. The income from the property, of course, in the first place, must be applied in paying the annuity to Mr. Martin. Any surplus over and above that, however, can no longer be accumulated. By virtue of the Act, that has ceased to be a thing which can be done.

The question therefore arises how certain income is to be dealt with, whether it belongs to the hospitals as the residuary legatees or whether it is undisposed of during the period between June 15, 1933, and the death of Mr. Martin, whenever that may be. If the true view be that it is undisposed of, then the surplus income must go to the heir-at-law
A and the next of kin of the testator.

As I have said, so long as the sale was made under the power which was contained in the will, with the consent of Mr. Martin, the hospitals got the benefit of such a sale, and the proceeds of sale were treated as though Mr. Martin were dead. However, so far as any surplus
B income is concerned, if the trusts of the will had been carried out apart from the Thellusson Act, the result would have been that the income of the unsold property would have been applied in the first instance in paying the annuity of Mr. Martin, and the whole of the remainder would have been accumulated during the rest of the life of
C Mr. Martin, and ultimately would have become part of the residue of the estate, and have gone to the persons entitled to residue. However, the Act has prevented the accumulations continuing beyond 1933. Therefore this question arises.

It appears to me that the question must turn very largely on the true
D construction to be put upon certain sections in the Settled Land Act, 1925. On Jan. 1, 1926, the Settled Land Act, 1925, came into operation, and thereupon, there being no tenant for life under the settlement in the will, the property became vested in the trustees with all the powers of a tenant for life. Sect. 23 provides as follows :

(1) Where under a settlement there is no tenant for life [as in this case] nor, independently of this section, a person having by virtue of this Act the powers of a tenant for life, then (a) any person of full age on whom such powers are by the settlement expressed to be conferred ; and (b) in any other case the trustees of the settlement ; shall have the powers of a tenant for life under this Act.

So the trustees on and after Jan. 1, 1926, were statutory owners with
F the powers of a tenant for life. It became necessary by virtue of the Act that there should be a vesting deed vesting the land in the statutory owners. Sect. 5 provides as follows :

(1) Every vesting deed for giving effect to a settlement or for conveying settled land to a tenant for life or statutory owner during the subsistence of the settlement
G (in this Act referred to as a " principal vesting deed ") shall contain the following statements and particulars, namely . . .

Then there has to be a description of the settled land, a statement that the settled land is vested in the persons to whom it is conveyed, and
H so on. Then, under para. (d) :

Any additional or larger powers conferred by the trust instrument relating to the settled land which by virtue of this Act operate and are exercisable as if conferred by this Act on a tenant for life.

Thus, in this case, there should have been a vesting declaration which would have contained what is required by sect. 5, including any additional or larger powers conferred by the trust instrument as provided by

subsect. (d). In truth and in fact, there never has been a vesting declaration at all, but there have been several sales between Jan. 1, 1926, and June 15, 1933. Those sales in every case, I think, were made, or purported to be made, by the trustees, with the consent of Mr. Martin. That is to say, they purported to be sales under the express power given to the trustees under the settlement. In the absence of a vesting declaration, which should have been in existence, but was not, there arises a question as to how far the sales could of themselves operate as sales at all. By sect. 13, as amended in 1926, it is provided as follows :

Where a tenant for life or statutory owner has become entitled to have a principal vesting deed or a vesting assent executed in his favour, then until a vesting instrument is executed or made pursuant to this Act in respect of the settled land, any purported disposition thereof *inter vivos* by any person, other than a personal representative (not being a disposition which he has power to make in right of his equitable interests or powers under a trust instrument), shall not take effect except in favour of a purchaser of a legal estate without notice of such tenant for life or statutory owner having become so entitled as aforesaid, but, save as aforesaid, shall operate only as a contract for valuable consideration to carry out the transaction after the requisite vesting instrument has been executed or made, and a purchaser of a legal estate shall not be concerned with such disposition unless the contract is registered as a land charge.

It is said that the effect of the sales in this case, there not having been a vesting deed or assent, is that in fact they operate only as contracts for sale, and that, accordingly, the purchase money which in fact has been received by the trustees is, in a sense, money which they ought not to have received, because there has never been any valid deed. I should note that sect. 75 provides as follows :

(1) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly. (2) The investment or other application by the trustees shall be made according to the direction of the tenant for life. . . . (5) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

I must turn now to sects. 108 and 109. Sect. 108 provides as follows :

(1) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or (save as hereinafter provided) by trustees with his consent, or on his request, or by his direction, or otherwise, and the powers given by this Act are cumulative. (2) In case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life or statutory owner exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail ; and, notwithstanding anything in the settlement, any power (not being merely a power of revocation or appointment) relating to the settled land thereby conferred on the trustees of the settlement or other persons exercisable for any purpose, whether or not provided for in this Act, shall, after the commencement of this Act, be exercisable by the tenant for life or statutory owner as if it were an additional power conferred on the tenant for life within the next following section of this Act and not otherwise.

Sect. 109 provides as follows :

(1) Nothing in this Act precludes a settlor from conferring on the tenant for life, or (save as provided by the last preceding section) on the trustees of the settlement,

any powers additional to or larger than those conferred by this Act. (2) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, and, if relating to the settled land, as if they were conferred by this Act on a tenant for life.

- The first question of construction that I have to consider is the true meaning of sect. 108 (1). The difficulty arises by reason of the use of the words "or otherwise." Apart from those words, the section seems to be reasonably plain. The effect of it is that there is nothing in the Act which is to take away any power subsisting under a settlement or by virtue of statute or otherwise exercisable by a tenant for life. So far, that is simply saying that no power of that sort exercisable by a tenant for life shall be affected prejudicially by the Act. Then come the words: "or . . . by trustees [that is to say, any power exercisable by trustees] with his consent [the tenant for life's consent] or on his request or by his direction." That again means that no powers exercisable by the trustees with the consent or request, or at the direction, of the tenant for life are to be affected prejudicially by the Act, and that the powers given by the Act are to be cumulative. Thus, there may be two powers, a power given by the Act and a power given by the settlement. The difficulty arises with regard to the words "or otherwise." Do the words "or otherwise" apply to a power exercisable by the trustees with the consent of the tenant for life whether the sale is to be with the consent, or by the request of, or at the direction of, the tenant for life, or by some other method, some other act to be done by the tenant for life, or do the words mean in general any power which is given to trustees, to be exercised with the consent of other persons? When one reads this section, it appears to me that, on the true construction of the section, the limited meaning is the true one to put upon it. What is being preserved by subsect. (1), in my judgment, is a power given to the trustees, where that power is a power which can only be exercised by the consent, direction or request, or by some other act, of the tenant for life, and does not refer to the consent or request of some other person. I find it difficult to appreciate exactly what the intention was in inserting the words "or otherwise," but I think that it would be reading into those two words a great deal more than the section is intended to effect if I were to read it otherwise than in the way I have indicated, in the limited way as referring to something which the tenant for life is to do or abstain from doing. Therefore, it seems to me that sect. 108 (1) does not operate to save a power of sale given to the trustees which is only exercisable, not with the consent of the tenant for life, but with the consent of some other person who is not the tenant for life at all. Of course, sect. 108 (1) is, as it were, a saving section. It is reserved to those particular powers which are there mentioned, and, in my judgment, does not extend to protect the particular power in this case. Then subsect. (2) provides:

In case of conflict between the provisions of a settlement and the provisions of

this Act, relative to any matter in respect whereof the tenant for life or statutory owner exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail ; and, notwithstanding anything in the settlement, any power (not being merely a power of revocation or appointment) relating to the settled land thereby conferred on the trustees of the settlement or other persons exercisable for any purpose, whether or not provided for in this Act, shall, after the commencement of this Act, be exercisable by the tenant for life or statutory owner as if it were an additional power conferred on the tenant for life within the next following section of this Act and not otherwise.

It becomes necessary to consider whether, in a case of this sort, there is a conflict between the provisions of the settlement and the provisions of the Act. Under the settlement, there is no power in the trustees to sell the land at all, except with the consent of Mr. Martin. Under the Act, the trustees have a power of sale as statutory owners, and they can disregard the consent of Mr. Martin or anyone else. It is said that in truth there is no conflict in those provisions, because the trustees might sell with the consent of Mr. Martin, and that such a sale would not of itself be improper, although they could not sell without his consent and in the face of his opposition. I appreciate that it might be said that you could have two such powers side by side, and that there was no conflict between the provisions of the settlement and those of the Act, but to my mind that is not the true view of it. It seems to me that the true construction of this section is that, where the Act gives to the tenant for life or the trustees or the statutory owners a general power of sale, as it does, a power of sale in the settlement, which is only a limited power, because it is restricted by conditions, is a power which is inconsistent with the general power of sale which the Act confers.

In my judgment, there is a conflict in a case of this kind between the provisions of the settlement and the provisions of the Act, because the provisions of the settlement are that there shall be no sale without the consent of Mr. Martin, so long as he is alive, whereas the provisions of the Act are that the trustees shall be given a power of sale during Mr. Martin's life, with or without his consent, and disregarding it altogether. Although I can see that it is possible to say that the two powers might co-exist, nevertheless the provisions of the settlement and of the Act are, in my judgment, inconsistent. The settlement visualises only a power which could be exercised in one particular way, and in no other way at all, whereas the Act itself intends that there shall be a general power, which shall be subject to no conditions at all. On the whole, I have come to the conclusion that the effect of the Act is that, as from Jan. 1, 1926, the power of sale was a power which was vested in the trustees under the Act, and that that was the only power which, as from that date, could properly be exercised by the trustees. The effect of the exercise of the power by the trustees under the Act was that the proceeds of sale were to be treated as capital moneys, and subject to the trusts of the settlement. Under the trusts of the settlement, the proceeds of sale were to be retained and the income was to be accumulated, but, as the Thellusson Act [the Accumulations Act, 1800, now the

Law of Property Act, 1925, s. 164] makes that no longer possible, there is nothing that I can see which can operate to dispose of such income under the settlement for the period from June 15, 1933, during the remainder of the life of Mr. Martin, with the result that the income as from that date is not effectually disposed of by the will at all. Accordingly, in my judgment, there is an intestacy to the extent of such income during the remainder of the life of Mr. Martin as from June 15, 1933. The result of that is that such income as would have been accumulated, and which, no doubt, apart from the Thellusson Act, could have formed part of the income, and would have gone to the hospitals, can no longer be accumulated and added to capital, but has to be dealt with as property undisposed of by the testator, which, accordingly, goes to the heir-at-law or next of kin of the testator. I make a declaration accordingly.

Solicitors : *Dollman & Pritchard*, agents for *Hayward, Smith & Mackey*, Rochester (for the plaintiffs and for the first defendant); *Kingsford, Dorman & Co.*, agents for *Tassell & Son*, Faversham (for the second defendants, the heirs in gavelkind); *Treasury Solicitor* (for the third defendant, the Attorney-General).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

BRIGHTY v. PEARSON.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 24, 1938.**]

Street Traffic—Motor vehicle—Exceeding speed limit—Evidence of two witnesses each relating to a different time and place on the road—Whether corroboration—Road Traffic Act, 1930 (c. 43), s. 10 (3)—Road Traffic Act, 1934 (c. 50), s. 2 (3), Sched. I.

The appellant was charged with having unlawfully driven a motor lorry at a speed greater than the maximum speed specified for a vehicle of that class or description in the Road Traffic Act, 1934, Sched. I, contrary to the Road Traffic Act, 1930, s. 10 (1). Evidence was given by one police officer of excessive speed, estimated by him at a place on the particular road, and by a second police officer to the same effect, estimated by him at a different place on the same road. Neither of the police officers had relied on a stop-watch or speedometer, nor was there any reference to any specified and measured distance for the purpose of calculating the speed of vehicles. The appellant contended that, inasmuch as the opinion of each police officer related to a different place on the road, and to a different time in each case, and inasmuch as the evidence of excessive speed at each place therefore consisted solely of the opinion of one police officer, there could not be a conviction by virtue of the Road Traffic Act, 1930, s. 10 (3), as substituted by the Road Traffic Act, 1934, s. 2 (3), which provided that "the evidence of one witness to the effect that . . . the person prosecuted was driving the vehicle at a speed exceeding" the speed limit, was by itself not sufficient for a conviction. The justices convicted the appellant, imposed a fine of 20s., and ordered that his licence be indorsed :—

HELD : as the vehicle had not been observed by the two police officers at the same moment, the justices were wrong in concluding that the

evidence was sufficient to comply with the section of the Act with regard to corroboration.

[EDITORIAL NOTE.] The Road Traffic Act, 1934, s. 2 (3), requires in short that the evidence of one witness that a driver was in his opinion exceeding the speed limit shall be corroborated. In the present case, it is true there is the evidence of two witnesses, but as they do not both speak to the same moment of time, it is held that the evidence of one does not corroborate the other.

AS TO SPEED LIMIT, see HALSBURY, Supp., Street and Aerial Traffic, para. 682 ; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 199a-207a.]

APPEAL by way of case stated from a decision of the justices for the borough of Cambridge. The appellant was charged with having unlawfully driven a motor lorry along the Huntingdon Road in the borough of Cambridge at a speed greater than the maximum specified in the Road Traffic Act, 1930, s. 10 (1), as amended by the Road Traffic Act, 1934, s. 2 (3), Sched. I. The evidence in support of the prosecution was given by two police officers, who gave their estimates of the speed at which the appellant was travelling. These officers, however, did not both speak to the speed of the appellant's lorry at the same time and place, the second officer having observed the lorry at a place further along the same road than that at which the first officer made his observation. Neither of the police officers had relied upon a stop-watch or speedometer, nor had they, for the purpose of calculating the speed of vehicles, marked out any specified and measured distance along the road. Upon these facts, it was contended that the requirements of the Road Traffic Act, 1934, s. 2 (3), as to corroboration were not satisfied.

The Road Traffic Act, 1934, s. 2 (3), substitutes the following subsection for the Road Traffic Act, 1930, s. 10 (3) :

A person prosecuted for driving a motor vehicle on a road at a speed exceeding a speed limit imposed by or under any enactment shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding that limit.

M. A. B. King-Hamilton for the appellant.

E. Garth Moore for the respondent.

LORD HEWART, L.C.J. : In this case, Mr. Garth Moore has said very clearly all that can be said on behalf of his client. In fact, the case is such that it seems to me impossible to dismiss this appeal. There is no need to reiterate the facts of the case, which are perfectly clear. There was observation by one police officer and observation by another police officer, but at no moment, as the facts are found, was there observation of the same vehicle at the same moment by the two police officers. What the interval was may be a matter of conjecture. That manifestly depends upon the curiously ambiguous expression "later he saw," since those responsible for drawing up the statement omit to say how much later. The words of the Road Traffic Act, 1934, s. 2 (3), are, I think, sufficiently plain :

A person prosecuted for driving a motor vehicle on a road at a speed exceeding a speed limit imposed by or under any enactment shall not be liable to be convicted

solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding that limit.

Here there were indeed two persons put forward in the capacity of witnesses, but at no moment was it possible to say that the effect of the evidence of one witness was corroborated by the effect of the evidence of the other witness. There was manifestly a gap, a lack of continuity, and it is not profitable to speculate, upon these facts, how long or how great that gap was. I do not think that, in a criminal case, one ought to make a conjecture unfavourable to the accused. The justices have come to the conclusion that the two constables had the vehicle under observation along the same stretch of road, and that therefore the evidence of each constable was such as constituted in law corroboration of the other's evidence. Unfortunately, that statement is to some extent elliptical. Let it be granted that two constables had the vehicle under observation along the same stretch of road. Nevertheless, the observations were not at the same time. I think that even the ingenuity of Mr. Garth Moore is unable to establish this case on a satisfactory basis, and the appeal must be allowed.

CHARLES, J. : I agree.

MACNAGHTEN, J. : I agree.

Appeal allowed with costs.

Solicitors : *Amery-Parkes & Co.* (for the appellant) ; *Field, Roscoe & Co.*, agents for *Guy W. Stanley & Shaw*, Cambridge (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

AMERICAN CHAIN & CABLE CO., INC. v. HALL'S BARTON ROPERY CO., LTD.

[CHANCERY DIVISION (Simonds, J.), **October 18, 19, 1938.**]

Practice and Procedure—Patents—Application for leave to inspect allegedly infringing machines—No prima facie case for inspection—Power of court to order inspection in special circumstances—Application for particulars of defendants' contentions—Agreement between the parties that no written statements of contentions should be made—Whether court should order particulars—R.S.C., Ord. 53A, r. 21A, (2).

In an action for damages for the infringement of letters patent, the plaintiffs applied for leave to inspect the machines of the defendants which made the alleged infringing article. The expert evidence before the court was conflicting, but showed that the article could be made with or without infringement. It was contended by the plaintiffs that the new R.S.C., Ord. 53A, r. 21A, gave the court power to order inspection even in cases where no *prima facie* case of infringement had been made out. The plaintiffs further asked that the defendants should give particulars of prior common general knowledge, lack of invention, lack of utility, and insufficiency. It had been agreed between the parties that no written statements of contentions should be made :—

HELD : (i) an order for inspection should not be made in such a case. The new rule was not intended to facilitate a fishing inspection of a defendant's machinery.

(ii) these desired particulars would not have been allowed under the old rule, and, to obtain them under the new rule, a plaintiff must show that there is some special reason for allowing them. The present plaintiffs had failed so to do, and the order asked for could not be made.

[EDITORIAL NOTE.] The rules relating to interlocutory applications in patent actions were recently amended with the object of giving the court a wider power in such matters. The court is, however, given a discretion in the exercise of these wider powers, and it is here held that it will not order what is called a "fishing" inspection of the machinery in the defendant's works. There must still be shown a *prima facie* case of infringement before inspection can be ordered. A

AS TO INSPECTION OF MACHINERY, see HALSBURY, Hailsham Edn., Vol. 24, pp. 682, 683, para. 1280; and FOR CASES, see DIGEST, Vol. 36, pp. 805-808, Nos. 2872-2925. See also YEARLY SUPREME COURT PRACTICE, 1938, B
pp. 1027, 1028.]

PROCEDURE SUMMONS for directions under R.S.C., Ord 53A, r. 21A, for the inspection of the defendants' machinery.

W. Trevor Watson, K.C., and G. H. Lloyd-Jacob for the plaintiffs. C
Basil Drewe for the defendants.

SIMONDS, J. : This is a summons for directions under R.S.C., Ord. 53A, r. 21A. It is a summons by the plaintiffs, the American Chain & Cable Co., Inc., claiming that the defendants, Hall's Barton Ropery Co., Ltd., are infringing a certain patent in relation to the making of a particular kind of wire rope by a particular process and a particular kind of machine. D

The first point at issue between the parties is whether the court should make an order that the plaintiffs' counsel and solicitors, and Mr. Hubert Alexander Gill, their expert, be at liberty in effect to enter upon the premises of the defendants to inspect and examine the machines for forming steel wire from pre-formed helices used by the defendants in the manufacture of their "True-lay" rope. It is common ground between the parties that, under the law as it stood before the introduction of the new r. 21A, in its present or in its earlier form, the old law was that the inspection of the defendants' machine should not be granted E
unless a *prima facie* case was made out of an infringement. F

Let me examine the present circumstances in the light of that. The evidence before me is this : first of all, an affidavit by Mr. Gill, an expert witness well-known in these courts, who, after stating that he is familiar with the specification of the letters patent in question, and that he is familiar also with the processes commercially used in the manufacture of wire rope, goes on to say that he entertains no doubt that the rope supplied by the defendants has been manufactured by the process described in the specification of the letters patent, and upon a machine substantially as described therein. That, if it stood by itself, would G
undoubtedly establish a *prima facie* case. That evidence, however, is answered by Mr. Ballantyne, an expert witness also well-known in these courts, who, having examined the specification, and having also seen the wire-rope-making machiner of the defendants, says, in para. 8 : H

The only process and machine which I find described therein is a process and

machine for forming wire into helices by passing the wire through a forming device in which force is applied around the periphery of the wire while the forming device is given a planetary motion around the axis of the strand rope or cable into which the wire from the forming device is laid. I have inspected all the various types of machines employed by the defendants at their works at Beverley, East Yorkshire, for making wire strands and wire ropes, and they have no such process or machine in use.

- A Some verbal criticism has been levelled at that statement of Mr. Ballantyne to the effect that he does not really cover the whole ground of the claim. Although he practically repeats *verbatim* the language of the process described in the body of the specification, I think that Mr. Ballantyne intends to deal—and to deal completely—with the suggestion
B made by Mr. Gill that the defendants' alleged infringing article is made, and can only be made, in accordance with the plaintiffs' patented process or machine. I think that he intends to deal with it, and I think that he does deal conclusively with that suggestion.

- Therefore, I find, in the first place, that the *prima facie* case there
C made by Mr. Gill in his evidence is displaced by the evidence of Mr. Ballantyne. However, the matter goes further than that, because Mr. Gill has stated further in his evidence that he was satisfied that no machine existed by which such an article as the defendants' alleged infringing article could be made except a machine or process which
D incorporated the plaintiffs' patented machine or process. Mr. Ballantyne in his further affidavit in reply has stated, and has exhibited in support of his statement, a piece of wire rope which shows conclusively that Mr. Gill is there wrong, and that there can be made an article in every
E respect similar to the article made by the plaintiffs' patented machine or process which is not made in accordance with that machine or process. Accordingly, it seems to me that, in accordance with the old law, I should be bound to hold that the plaintiffs have not made out such a *prima facie* case as to entitle them to inspection of the defendants' machine.

- F Then it is suggested that, however that may be under the old law, under the new rule a wider power is given to the court—a power which, of course, is discretionary, but nevertheless a power which ought to be used in this case, to order an inspection of the defendants' machine. It may well be that, under the new r. 21A, and particularly having regard
G to the last words of subrule (2) of the rule, the court has a wider power than hitherto to order inspection of a defendant's machinery, but I find in this case no special circumstances which would justify me in ordering that to be done which, under the old law, could not be done. I do not think that this rule was intended to pave the way for what may well
H prove to be nothing more than a fishing inspection of the defendants' machinery. Where I find, as here, that the evidence shows that a particular article may be made either by infringing the patented process or without infringing the patented process, and there is nothing to guide the court to a conclusion one way or the other, I do not think that in such circumstances the court ought to order an inspection of the

defendants' machinery. Therefore, so far as that question is concerned, I decide in favour of the defendants, and do not order inspection.

The next point at issue was this. The plaintiffs further asked that the defendants should give particulars of a number of matters set out under four sub-heads: first of all, the matters relied upon by the defendants as matters of prior common general knowledge; secondly, the respects in which it is alleged that the invention is not a new manner of manufacture and is obvious and involves no inventive step; thirdly, the respects in which it is alleged that the invention is not useful; and, fourthly, the respects in which it is alleged that the specification does not sufficiently or fairly ascertain the scope of the monopoly claimed. In regard to each of those four sub-heads, it was said by Mr. Trevor Watson, in his candid opening of the case, that again, prior to the introduction of the new rule, the court would not have directed such particulars to be given by the defendants. Mr. Drewe, in his argument for the defendants, called my attention to various authorities which fully substantiate the admission Mr. Trevor Watson made, but it is said that, under the new rule, a new practice ought to prevail. I must confess that I find myself in considerable difficulty. The new rule provides, amongst other things, for directions being given—that is to say, for the court having discretionary power to make a direction for the delivery of statements signed by counsel, setting out all the contentions, whether of fact or of law, including contentions as to the construction of the specification or other documents upon which the parties respectively intend to rely. It does appear to me that that contemplates that there may be required a written statement which would contain such particulars, or, at any rate, some such particulars as, under the previous practice, would not have been ordered. Therefore, I must, I think, view the matter in the first place in this way—that the new rule does contemplate the possibility of information being given by the defendants or by the plaintiffs which, under the previous practice, would not have been given.

In this case, the parties have, for reasons which were no doubt adequate, agreed that a written statement should not be given. Each side was content to proceed upon the footing that there should be no such written statement. Then the plaintiffs ask, nevertheless, that the particulars should be given which, under the old rule, would not have been given. I think that, if that course is taken, it is incumbent upon the plaintiffs to show some reason why, in the circumstances of such a case, such particulars should be ordered as, under the previous rule, would not have been ordered. I find here that no special circumstances are shown. I shall be very glad of guidance from a higher court as to whether, in such a case as this, where there is no written statement by agreement, nevertheless, though no special circumstances are shown, these particulars should be given. In my view, as at present instructed, it appears to me that, in the absence of some special circumstances, I ought to abide by

the long-standing practice that particulars of these matters under the several sub-headings to which I have referred should not be given. Accordingly, on that part of the summons also I decide in favour of the defendants, and shall not make any order for the particulars in question.

Solicitors : *Lovell, White & King* (for the plaintiffs) ; *Vizard, Oldham, Crowder & Cash* (for the defendants).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

R. v. WESTON-SUPER-MARE LICENSING JUSTICES, *Ex parte* POWELL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 27, 1938.**]

Intoxicating Liquors—Licensed premises—Alterations—Alterations involving extension of licensed premises—Jurisdiction of justices—Licensing (Consolidation) Act, 1910 (c. 24), s. 71.

A licensee of licensed premises made an application to the local justices for approval of certain alterations to the premises, involving the inclusion of certain adjoining premises, which had hitherto been entirely separate from the licensed premises, and an enlargement of the existing saloon bar. Plans of the proposed alterations were duly deposited with the clerk to the justices. The justices came to the conclusion that they had no power to grant the application, as the bulk of the alterations was to premises not already licensed, but they were ready to approve the alterations in so far as they related to the premises already licensed :—

Held : the justices came to a correct conclusion, because, under the Licensing (Consolidation) Act, 1910, s. 71, they had no power to sanction alterations which involved an extension of the licensed premises, as was here obviously contemplated by the licensee.

[**EDITORIAL NOTE.** The power to alter licensed premises with the consent of the licensing justices now given by the Licensing (Consolidation) Act, 1910, s. 71, is a power which is confined to the alteration of existing licensed premises, and the court will not construe it as a power to add unlicensed premises to the existing licensed premises. No doubt the border line between the alteration of existing premises and their extension by the addition of new premises may be, in some cases, hard to define, but, if the justices have found upon some proper evidence that what is intended to be done in fact amounts to an alteration, and not an extension, the court, on appeal from the justices, will consider the matter as one of fact for the decision of the justices, and will treat their decision as final.

AS TO ALTERATIONS IN LICENSED PREMISES, see HALSBURY, *Hailsham Edn.*, Vol. 19, pp. 38, 39, paras. 102-104 ; and FOR CASES, see DIGEST, Vol. 30, pp. 44, 45, Nos. 339-344.]

Case referred to :

(1) *R. v. Isle of Wight JJ.* (1931), Br. Tr. Rev. 474.

APPLICATION to make absolute a rule *nisi* granted at the instance of William Herbert Powell, the licensee of the Three Queens Hotel, Weston-super-Mare, calling on the licensing justices for the Weston-super-Mare petty sessional division to show cause why a writ of *mandamus* should not issue commanding them to hold a transfer sessions meeting to hear

and determine an application by the said licensee under the Licensing (Consolidation) Act, 1910, s. 71, for the approval of the justices to certain alterations at the hotel.

The Attorney-General (Sir Donald Somervell, K.C.) and Valentine Holmes showed cause on behalf of the Commissioners of Customs and Excise.

P. Colin Duncan on behalf of the justices.

G. J. Lynskey, K.C., and R. F. Lyne in support of the rule.

LORD HEWART, L.C.J. : This is a rule *nisi* for a writ of *mandamus* to be directed to the licensing justices for Weston-super-Mare in Somerset commanding them to hold a transfer sessions meeting and at that meeting to proceed to hear and determine an application by one William Herbert Powell, under the Licensing (Consolidation) Act, 1910, s. 71, for the approval of the justices to certain alterations at the Three Queens Hotel in Weston-super-Mare. The grounds upon which the rule was asked and granted were that the justices had refused to hear and determine the application made to them according to law.

It is quite clear from the affidavits which are before the court that an application was made to these licensing justices, and was made ostensibly under the Licensing (Consolidation) Act, 1910, s. 71, but the object of the application was, among other things, to obtain sanction for a scheme whereby it was proposed by a brewery company to incorporate (I am following the words of Mr. Powell's affidavit) the ground floor of certain adjoining premises, known as No. 25, Oxford Street, Weston-super-Mare, which had hitherto been entirely separate from any licensed premises. Such incorporation would have enabled the existing lounge on the ground floor of the licensed premises to be enlarged, and would also have enabled better access to be given to certain lavatory accommodation.

The justices heard the application, heard the evidence, and examined the plans which are now before this court. Without going into further detail, one may say that it is perfectly obvious, on a view of those plans, that what was contemplated and desired by the licensee, or by the brewery company, was not merely within the four walls of the existing licensed premises to make certain alterations, and certain alterations involving the ingredient of increasing what are called facilities for drinking, but also externally to those premises to add on further premises, and to add them on in such a way as to increase yet again the facilities for drinking.

Whatever may be the essential merits of that scheme, and however desirable it may be that the inhabitants of Weston-super-Mare or their visitors should have ample facilities for drinking, it seems to me that these justices came to a perfectly correct decision on the materials before them when they decided (and this was their only decision) to refuse the application. There seems to have been some little misapprehension

as to the effect of sect. 71 of the Act of 1910. It may be well to read again the words of sect. 71 (1), which provide as follows :

An alteration in any licensed premises in respect of which a justices' on-licence is in force, which gives increased facilities for drinking . . . shall not be made without the consent of the licensing justices given either at the general annual licensing meeting or at transfer sessions

A The application with which we have to deal was an application made to licensing justices, and made at transfer sessions. It was, so far as part of it was concerned, an application referring to an alteration in certain licensed premises, and that alteration, if made, would have the manifest effect, as the plan shows, of giving increased facilities for drinking. It might have done other things also, but that effect was certainly contemplated, and was a part of the scheme. That application was put before the justices in a way which made it absolutely clear that the increased facilities for drinking so contemplated were also to be increased in yet another way—namely, by the acquisition of premises which were not yet part of the licensed premises, to be added on to them and to be used in the manner shown on the plan. In other words, the saloon bar was to be considerably increased by the addition of a floor space not comprised within the existing limits of the saloon bar. The justices, having before them the application for consent to the alteration, declined to give consent, and fortunately there is on paper a record of the opinion and conclusion which the justices expressed. Having expressed the view that the contemplated alterations (in the plural) would not destroy the identity of the premises, and that the alterations (in the plural) were necessary and desirable, the justices went on to say :

E They have, however, come to the conclusion that in view of the decision in *R. v. Isle of Wight JJ.* (1) they have no power to grant the application as the bulk of the alterations are to premises not already licensed. The justices would be prepared to consent to the alterations so far as they relate to the premises already licensed.

F What was really and strictly before the justices was a proposal for the alteration of the premises already licensed, but it was fettered and embarrassed by other proposals, which, when they were examined, were found to be part and parcel of the same essential scheme, proposals for alterations external to the premises. In my opinion, the justices came to a correct conclusion, and I think that they took a correct view of the decision in *R. v. Isle of Wight JJ.* (1), of which we have been supplied with a report. In my opinion, the words " An alteration in any licensed premises " in sect. 71 of the Licensing Act mean what they say. They mean an alteration in the licensed premises. They do not mean an alteration in licensed premises accompanied by alterations in premises not licensed. I think that this application to these justices was complicated, and in fact that there was manifestly added to the scheme of alteration an accompanying scheme relating to matters wholly external to the licensed premises. Yet it was no less obvious that that part of the scheme which had to do with the existing licensed premises undoubtedly contemplated the giving of increased facilities for drinking.

I think, therefore, that these justices were perfectly entitled to say that they refused to give their consent, and refused upon two quite different grounds : (i) because the alterations which were asked for must give increased facilities for drinking, and (ii) because, when those alterations were looked at in the form in which they were presented to the justices, it was clear that they contemplated, and essentially depended upon, the incorporation of premises not yet part of the licensed premises. A

I think that the argument which the Attorney-General has put forward in this case is really unanswerable, and that these justices came to a correct determination. However, it really is not necessary to go so far as that. At this moment, this court is being asked to issue a writ of *mandamus* to these justices to hear and determine. In my opinion, it is clear that these justices have heard and have determined, and that their task is completed. I see no ground for the making of a rule. B

CHARLES, J. : I agree. On May 6, 1938, an application was made to the licensing justices sitting at Weston-super-Mare, acting for the division of Weston-super-Mare at adjourned transfer sessions, to assent to certain alterations of the Three Queens Hotel, Weston-super-Mare. It was undoubtedly within their power, and they recognised it to be within their power, under sect. 71 to consider and approve, if the alterations gave increased facilities for drinking, any alterations in any licensed premises in respect of which a justices' on-licence was in force. They did hear the evidence and the arguments, and they did express in their memorandum their willingness to determine in favour of the applicant the application so far as it referred to the existing licensed premises. However, when they came to consider the matter, they found themselves faced, not with a single application, but with a compound application. They found that it involved territorial increase of the existing licensed premises by incorporation of adjoining premises not licensed. C
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Having had brought before them the decision in *R. v. Isle of Wight JJ.* (1) by this court, though a court differently constituted, they came to the conclusion that "an alteration in any licensed premises" means what it says. The word "in" does not connote out, or outside. That is really putting it in a very simple manner, and that is what it comes to. They were asked to consider alterations not only in, but also out. They had no jurisdiction at all to assent to alterations outside the existing licensed premises, and so they said (obviously with regret, but they said it, and they said it rightly) that they were perfectly willing to hear and determine, and they did hear and were willing to determine, the case in favour of the applicant, so far as the existing licensed property was concerned. They said : "However much we wish it, we cannot in law deal under this section, sect. 71, with properties outside of the licensed premises which the plans seek to incorporate in these existing licensed premises." Having said that, there was a con- G
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clusion of the matter. In my judgment, they came to a perfectly proper conclusion, and the only conclusion, indeed, to which they could by law have come.

MACNAGHTEN, J. : I agree, and have nothing to add.

A *Rule discharged with costs.*

Solicitors : *Solicitor of Customs and Excise* (showing cause) ; *Cameron, Kemm & Co.*, agents for *John Hodge & Co.*, Weston-super-Mare (for the justices) ; *Godden, Holme & Ward*, agents for *Smiths, Ford & McFadyean*,

B Weston-super-Mare (in support of rule).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*

SIDERY v. EVANS AND PETERS.

C [KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 26, 1938.**]

Street Traffic—Licensing of vehicles—Using motor vehicle as express carriage otherwise than under road service licence—"Special occasion"—Passengers travelling "frequently"—Road Traffic Act, 1930 (c. 43), ss. 61 (2), 72 (1), (10)—Road Traffic Act, 1934 (c. 50), s. 25 (1) (e).

D The respondents were respectively charged with unlawfully using and causing to be used a motor vehicle as an express carriage otherwise than under a road service licence, in contravention of the Road Traffic Act, 1930, s. 72 (1), (10). Certain passengers, all of whom had become members of a club merely upon payment of an entrance fee of 3d., were conveyed by motor coach from a particular place to a particular football ground on each occasion when the football club played "home" matches at the football ground, the sum of 1s. 6d. for the return journey being paid by each passenger to the second respondent, who hired the coaches from the first respondent at the rate of 30s. per 32-seater coach, and 25s. per 26-seater coach. The coaches were driven either by the first respondent or by his servant. The first respondent was at all material times aware that separate fares were being paid by the passengers to the second respondent. The justices, having some doubt on the matter, dismissed the charges, and thereupon this appeal was brought :—

F HELD : (i) the motor vehicles clearly came within the statutory definition of "express carriage," in that they were carrying passengers (a) for hire or reward, (b) at separate fares, and (c) none of whom paid less than 1s. per passenger.

G (ii) on the facts of the case, it was impossible to hold that there was a "special occasion for the conveyance of a private party" within the proviso to the Road Traffic Act, 1930, s. 61 (2).

(iii) in any event, the statutory condition of a "special occasion" imposed by the Road Traffic Act, 1934, s. 25 (1) (e)—namely, that the passengers must not include any person who travels frequently on such journeys—had not been complied with.

H [EDITORIAL NOTE. In this case, the provisions of the Road Traffic Acts relating to the conveyance on a special occasion of a private party, were sought to be complied with by the formation of a club, of which the membership seems to have been purely nominal. The journeys in question were to the ground of a football club, and membership of the club seems to have carried the right to journey to and from all the "home" matches of the club for at least one season. The various journeys

were paid for by means of a separate fare in respect of each passenger. Upon this, it was successfully argued that the passengers included persons who frequently, or as a matter of routine, travelled at or about the time of day at which the journey was made to that destination from the same starting point. It will be noted that the time between those journeys would in most cases be at least one week, and often longer, but, since the passengers travelled as often as opportunity offered, they are held to be persons who frequently travelled at or about the time of day at which the journey was made. A

AS TO SPECIAL OCCASION, see HALSBURY, Supp., Street and Aerial Traffic, para. 611; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 760-76S.]

APPEAL by way of case stated from a decision of the justices for the county of Essex sitting at Stratford. The following facts were proved or admitted. The appellant was a traffic examiner for the metropolitan traffic area. The respondent Evans carried on business at Castle Garage, High Road, Woodford Green, as a motor coach proprietor, and was at all material times the owner or operator of motor coaches bearing the registration numbers E.K. 8204 and A.W.T. 456. The respondent Evans at one time held a road service licence authorising him to operate express carriages between Woodford Green and the Tottenham Hotspur football ground, Tottenham, but this licence was revoked by the traffic commissioner for the metropolitan traffic area on or about Feb. 23, 1937, since which date the respondent Evans has held no road service licence authorising him to operate such service. The respondent Peters carried on business as a confectioner and tobacconist at a shop situate at 19, High Road, Woodford Green. On Sept. 20, 1937, one Thomas Magnusson entered that shop and inquired of Peters whether he had two seats available for himself and one Smith on a motor coach which was travelling from Woodford Green to a football match at the Tottenham Hotspur football ground on Sept. 25, 1937. Peters replied that two seats were available upon the coach, but that, before booking them, Magnusson and Smith would have to join the Woodford Sports and Outing Club by making a payment of 3*d.* each. Magnusson thereupon paid to Peters 6*d.* on behalf of himself and Smith, and a further sum of 3*s.* (that is, 1*s.* 6*d.* each) for two seats on the coach. Peters then entered the names and addresses of Magnusson and Smith in a book. Magnusson was not given any tickets for the seats, nor was he given, nor was his attention drawn to, any rules of the club. Magnusson and Smith were inspectors in the employ of the London Passenger Transport Board. On Saturday, Sept. 25, 1937, Magnusson, accompanied by Smith, went to the shop, where Peters handed to him a printed card in the following terms : B
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WOODFORD SPORTS AND OUTING CLUB, 1937
Hon. Sec. : G. H. PETERS, 19, High Road, Woodford Green
MEMBERSHIP CARD
Name : MR. T. MAGNUSSON
No. 106
Subscription : THREEPENCE

Peters handed a similar card to Smith, and then directed Magnusson

and Smith to a 32-seater motor coach, owned and operated by Evans, which was standing outside the Castle Hotel, Woodford, and in which Magnusson and Smith were conveyed to and from the football match at the football ground. Nineteen passengers were carried on the motor coach, including Evans himself. On Saturday, Oct. 9,

- A 1937, Magnusson and Smith were again conveyed on the same journey in a motor coach similarly owned and operated, when nineteen passengers were carried in the coach. On Saturday, Oct. 23, 1937, twenty-one passengers were similarly carried on the motor coach, three or four of whom had made the journey on previous occasions. On
- B Saturday, Nov. 6, 1937, nine passengers were carried on the motor coach, seven of whom had made the journey on previous occasions. On Saturday, Nov. 20, 1937, twenty-seven passengers were carried on the coach, of which eighteen had made the journey on previous occasions. On Saturday, Dec. 4, 1937, nineteen passengers were carried in the coach,
- C sixteen of whom had made the journey on previous occasions. On Saturday, Dec. 18, 1937, twelve passengers were carried in the coach, ten of whom had made the journey on previous occasions. On Monday, Dec. 27, 1937, thirty-two passengers were carried in the coach, one of whom had made the journey on previous occasions. A number of other
- D persons endeavouring to board this coach were directed by the driver to the motor coach bearing the registration number E.K. 8204, which also made the journey. On Saturday, Jan. 8, 1938, Magnusson and Smith, without being called upon to make any payment for the same, were given by Peters new membership cards for the club for 1938, and
- E were again conveyed from the Castle Hotel, Woodford, to and from the football ground, when seventeen passengers were carried on the coach, thirteen of whom had made the journey regularly on previous occasions. On Saturday, Jan. 15, 1938, Magnusson and Smith, together with two other passengers who had made the journey regularly on
- F previous occasions, were conveyed from the Castle Hotel, Woodford, to and from the football ground in a private motor car, owned and driven by Evans. Other passengers were taken in another motor car owned by Evans. On Saturday, Jan. 29, 1938, eleven passengers were carried in the motor coach, all of whom had made the journey regularly on previous
- G occasions. These journeys to the football ground were made upon the occasions when the Tottenham Hotspur football club's first team were playing "home" matches—that is to say, matches at this football ground. The team play not less than twenty-one "home" matches in the year. Excluding Magnusson and Smith, two or three other persons were
- H passengers on all, or nearly all, of the aforementioned journeys. Magnusson resided at Woodford, and was a regular spectator at "home" matches of the Tottenham Hotspur football club's first team. In respect of each of the journeys referred to, all the passengers, all of whom were members of the said club, paid to Peters the sum of 1s. 6d. each for their seats for each return journey. Peters hired the coaches from Evans at

the rate of 30s. per 32-seater coach and 25s. per 26-seater coach. On each occasion, except on the occasions when, as stated, Evans drove himself, the driver was a servant of Evans, and operated the vehicles mentioned. The club was formed because, as appears from the case stated, Evans had lost his licence to operate an express service from Woodford to the football ground. Evans was at all material times fully aware of the purpose for which the coaches which he hired to Peters were being used, and was also at all times fully aware of the fact that separate fares were being paid to Peters by members of the club. A

On the part of the appellant, it was contended that, on the occasions of the journeys referred to in the informations, Evans was using, and Peters was causing to be used, the vehicles therein specified as express carriages, in that the passengers were carried at separate fares, and that the requirements of the Road Traffic Act, 1934, s. 25 (1) (e), had not been complied with, since the passengers included persons who frequently, or as a matter of routine, travelled from Woodford to the "home" matches of the Tottenham Hotspur football club's first team on the football ground. C

Valentine Holmes for the appellant.

The respondents were not represented. D

LORD HEWART, L.C.J. : This is a case stated by justices for the county of Essex sitting at Stratford. It arises out of an information preferred by the appellant, an examiner for the metropolitan traffic area under the Road Traffic Act, 1930. There are two respondents. The respondent Evans was charged with having unlawfully used a motor vehicle as an express carriage otherwise than under a road service licence in contravention of the Road Traffic Act, 1930, s. 72 (1), (10), and the respondent Peters was charged with having unlawfully caused the aforesaid motor vehicle to be used as an express carriage in contravention of the law. E The justices, having heard the informations, dismissed all the charges, F and the question for this court is whether in so doing the justices came to a correct determination in point of law.

It is, perhaps, unfortunate that there has been before us no appearance on behalf of the respondents or either of them. It is unfortunate because it is well, if possible, that both sides should be heard, even though it is apparent that there is not much to be said for one of the two sides. I would only say that, in the absence of counsel for the respondents, Mr. Valentine Holmes, appearing for the appellant, has put forward with complete knowledge of the law bearing upon the matter—and has put forward clearly and fairly—every argument which, as it seems to me, the respondents' counsel might have urged if the respondents' counsel had been in existence. I cannot imagine that the mere absence of counsel for the respondents has had the effect of preventing from being adduced before the court any argument which conceivably might have been of use. H

In my opinion, the justices here came to a wrong conclusion. I think that the contentions of the appellant were—I say it with all due respect to the justices—manifestly right. It was contended that, on the occasions of the journeys referred to in the two informations, the respondent Evans was using, and the respondent Peters was causing to be used, the vehicles therein specified as express carriages, in that the passengers were carried at separate fares and that the requirements of the Road Traffic Act, 1934, s. 25 (1) (e), had not been complied with, inasmuch as the passengers included persons who frequently, or as a matter of routine, travelled from Woodford to the “home” matches of the Tottenham Hotspur football club’s first team on the football ground, and that in the premises the respondents were guilty of the offences charged against them. The contention *per contra* was that the provisions of sect. 25 (1) of the Act of 1930 had been complied with, and, in that state of the controversy, the justices came to the conclusion that the provisions of the Road Traffic Act, 1934, s. 25 (1) (e), had been complied with, and that, having regard to the lapse of time between the dates upon which the vehicles were used, the passengers did not include any person who frequently, or as a matter of routine, travelled on the vehicles.

It seems to me to be clear that the justices came to an erroneous determination in point of law. I am not going to repeat in full the clear and convincing argument which we have heard from Mr. Valentine Holmes, but, shortly to recapitulate the salient points, I may point out that, under the Road Traffic Act, 1934, s. 24, certain paragraphs were substituted for certain other paragraphs in the principal Act—that is to say, in the Act of 1930—and, so far as express carriages were concerned, the new paragraph which is substituted is this :

(b) Express carriages ; that is to say motor vehicles carrying passengers for hire or reward at separate fares none of which is less than 1s. or such greater sum as may be prescribed.

There are certain matters added for the purposes of that new paragraph, but they are, for this case, immaterial. On the facts as stated in this case, it leaps to the eye that here were motor vehicles carrying (a) passengers for hire or reward, (b) at separate fares, and (c) none of whom paid less than 1s. It is found as a fact that the fares were 1s. 6d. That statement of the law, in my opinion, on the facts of this case, concludes the matter, but, if further investigation had been made, I am satisfied that the defendants, the respondents, if they had been here, could have taken nothing from an argument based, if an argument had been based, upon the provisions of the Road Traffic Act, 1930, s. 61 (2). By that subsection it is provided :

... where persons are carried in a motor vehicle for any journey in consideration of separate payments [not payment] made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not.

Then comes the proviso :

Provided that a vehicle used on a special occasion for the conveyance of a private

party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only [a very important word] that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion.

If that argument had been adduced on behalf of these respondents, it would have been met, I take it, quite easily by the reply that, on the facts of this case, it was impossible to find a special occasion within the meaning of sect. 61 (2). The facts contained in this case not only are not consistent with, but clearly negative, the notion of a special occasion. Finally, it is conceivable that, if the argument had been conducted before us, and the question of special occasion had been raised, our attention would have been directed to sect. 25 (1) of the Act of 1934. It is inconceivable that our attention would not have been so directed. By that section it is provided :

For the purposes of the proviso to sect. 61 (2) of the principal Act, a vehicle shall be deemed to be used on a special occasion for the conveyance of a private party where it is used on a journey in relation to which the following conditions are satisfied, and not otherwise (that is to say) . . .

There follows a long series of conditions, all of which have to be satisfied if the argument of special occasion is to be successful. In that enumeration of conditions one finds condition (e) :

In the case of a journey to a particular destination the passengers must not include any person who frequently, or as a matter of routine, travels, at or about the time of day at which the journey is made, to that destination from a place from or through which the journey is made.

Here it is apparent, on the facts as found, that the passengers carried did include persons who frequently travelled, at about the time of day at which the journey was made, to the destination from a place from which the journey was made. Indeed, it is manifest that there was a systematic travelling by persons who were the same individuals, who travelled on various occasions when the opportunity was offered of witnessing a match in which the particular football team were expected to take part. The justices have stated that, in their opinion, the provisions of the Road Traffic Act, 1934, s. 25 (1), were complied with, and they have purported to find as a fact in the course of their expression of opinion :

. . . that having regard to the lapse of time between the dates upon which the said vehicles were used the passengers did not include any person who frequently or as a matter of routine travelled on the vehicles.

With all due respect to these justices, that conclusion seems to me to be at variance with the facts as found. The recurrence of the occasion upon which the same passengers made the same journey was a recurrence governed by the number of occasions on which these matches were played, and, in fact, the occasions recurred whenever the matches recurred. There was as high a degree of repetition or frequency as the circumstances could possibly permit. In these circumstances, it seems to me that the contentions raised by the appellant were right, and that the conclusions involved in the finding of the justices are not to be sustained. I think,

therefore, that this appeal succeeds, and that the case ought to go back to the justices with the direction in each case that the offence which was charged was proved.

A CHARLES, J. : I agree, and I have nothing to add, inasmuch as, in my view, upon the facts as stated, the contentions of the appellant are absolutely unanswerable.

MACNAGHTEN, J. : I agree.

Appeal allowed with costs.

B Solicitor : *Treasury Solicitor* (for the appellant).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

C *Re* BRADSHAW, BLANDY v. WILLIS.

[CHANCERY DIVISION (Bennett, J.), July 25, 26, 27, 28, October 27, 1938.]

D *Husband and Wife—Marriage—Presumption of marriage—Parties living as husband and wife—Subsequent marriage ceremony—Parties described as bachelor and spinster in certificate of ceremony.*

The parents of the first and second defendants lived together as man and wife for many years from about 1890, and enjoyed the reputation of being married persons. Five children were born of the union (including these defendants) prior to Nov. 22, 1898, when the parents went through a ceremony of marriage, after banns, at the parish church of Fulham. The birth and baptismal certificates of the children gave the surname of the mother as the same name as that of the father. It was proved that from time to time prior to that ceremony statements were made by both parents to the effect that they had been married, and a solicitor who witnessed the marriage ceremony in 1898 deposed that the husband had stated to him that he had married E. J. (the mother) in Scotland. The certificate of the marriage in 1898 showed that the register which the parents signed described them as bachelor and spinster, respectively. These defendants claimed that, notwithstanding this certificate, a marriage prior to 1893 should be presumed :—

F HELD : if the evidence had consisted only of the birth and baptismal certificates and the declarations of the parents, together with the reputation they enjoyed of being married persons, it must be presumed in law that the parents had been married prior to 1893. However, the marriage certificate relating to the ceremony performed in 1898, and the statements of fact contained in it, rebutted any legal presumption of a prior marriage of the parties.

G [EDITORIAL NOTE. It has always been held that, where parties have lived together as husband and wife, and have been accepted as such by their friends and neighbours, there is a strong presumption that they have been legally married, and the courts have in particular tried to avoid any decision which would bastardise children reputed to be legitimate. In the present case, the parties in a certificate of a marriage ceremony performed after the birth of the children were described as single persons, and this is held to rebut the strong presumption of marriage and of the legitimacy of the children.

AS TO PRESUMPTION OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 16. pp. 598, 599, para. 931; and FOR CASES, see DIGEST, Vol. 27, pp. 70, 71, Nos. 542-548.]

Cases referred to :

- (1) *Piers v. Piers* (1849), 2 H.L.Cas. 331; 27 Digest 69, 536; 13 L.T.O.S. 41.
- (2) *Morris v. Davies* (1837), 5 Cl. & Fin. 163; 3 Digest 363, 49. A
- (3) *Breadalbane Case, Campbell v. Campbell* (1867), L.R. 1 Sc. & Div. 182; 27 Digest 67, 509.
- (4) *Re Thompson, Langham v. Thompson* (1904), 91 L.T. 680; 27 Digest 69, 527.
- (5) *Re Turner, Glenister v. Harding* (1885), 29 Ch.D. 985; 3 Digest 367, 85; 54 L.J.Ch. 1089; 53 L.T. 528.
- (6) *Re Stollery, Weir v. Treasury Solicitor*, [1926] Ch. 284; Digest Supp.; 95 L.J.Ch. 259; 134 L.T. 430. B
- (7) *De Thoren v. A.-G.* (1876), 1 App. Cas. 686; 27 Digest 67, 510.
- (8) *Sastry Velaidar Aronegary v. Sembecutty Vaigalie* (1881), 6 App. Cas. 364; 27 Digest 64, 459; 44 L.T. 895; *sub nom.* *Sastry Velaidar Aronegary & Sembacutty Sinnepullei v. Kassanader Sambonade*, 50 L.J.P.C. 28.
- (9) *Shedden & Shedden v. A.-G. & Patrick & Patrick* (1860), 2 Sw. & Tr. 170; 3 Digest 370, 114; 30 L.J.P.M. & A. 217; 3 L.T. 592; *affd. sub nom.* *Shedden v. Patrick & A.-G.* (1869), L.R. 1 Sc. & Div. 470. C
- (10) *Collins v. Bishop* (1878), 48 L.J.Ch. 31; 27 Digest 68, 520.
- (11) *Goodman v. Goodman* (1859), 28 L.J.Ch. 745; 27 Digest 72, 567; 33 L.T.O.S. 70.
- (12) *Re Shephard, George v. Thyer*, [1904] 1 Ch. 456; 27 Digest 65, 472; 73 L.J.Ch. 401; 90 L.T. 249. D
- (13) *Re Haynes, Haynes v. Carter* (1906), 94 L.T. 431; 27 Digest 69, 534.
- (14) *Fox v. Bearblock* (1881), 17 Ch.D. 429; 27 Digest 70, 545; 50 L.J.Ch. 489; 44 L.T. 508.

ACTION for a declaration that, notwithstanding an order made on May 8, 1931, in *Re Bradshaw, Bradshaw v. Bradshaw*, the defendants are not entitled to any beneficial interest in the residuary estate of William Bradshaw, deceased, on the footing that they are the children of Arthur Evelyn Bradshaw. In the alternative, an inquiry was asked as to who are the persons entitled to share in the residuary estate as children of Arthur Evelyn Bradshaw, and an account of all moneys received by the defendants respectively, on the footing that they were entitled to share in the residuary estate, and repayment of the moneys found due by the defendants on taking such account. E

Hon. C. R. R. Romer, K.C., and *Roger W. Turnbull* for the plaintiff. *J. M. Gover, K.C.*, and *R. W. Goff* for the first and second defendants. *John H. A. Sparrow* for the third defendant. F

Edward M. Winterbotham for the trustees of William Bradshaw, deceased. G

Romer, K.C.: The parties moved about, and it was difficult, therefore, to acquire the reputation of a married couple. There is no evidence of any kind that a marriage took place in Scotland, as deposed to in the statement made by one of the witnesses. The marriage which took place in 1898 is fatal to any presumption of an earlier marriage. On the certificate of this marriage the parties are described as bachelor and H

spinster, and, under the Marriage Act, 1840, s. 4 (now re-enacted by the Perjury Act, 1911, s. 3), the parties to a marriage must be married in their proper names. [Counsel referred to *Piers v. Piers* (1), *Morris v. Davies* (2), *Breadalbane Case*, *Campbell v. Campbell* (3), *Re Thompson, Langham v. Thompson* (4), and to HALSBURY'S LAWS OF ENGLAND,

A Hailsham Edn., Vol. 16, p. 594, para. 921.]

Gover, K.C. : There was a marriage in Scotland in 1889 or 1890. We have here cohabitation, reputation, and a number of declarations, none of which has been challenged. The mere fact of continued cohabitation as man and wife raises a presumption of law that they were married.

B If, coupled with this, we have evidence of repute that the parties were married, and the children legitimate, this strengthens the presumption ; and, in addition, if we have declarations affirming this, the presumption becomes stronger still. The only fact rebutting this is the marriage of 1898. Why should the parties have waited until 1898 to have contracted

C this marriage ? There was no impediment to an earlier marriage, and they were on terms of the greatest affection. They go to a solicitor, as given in evidence, and tell him that they were married in Scotland, but that, through the wife's religious scruples, they wish to be married again. This is perfectly reasonable. On the presumption of law, and on the

D evidence, which is all on one side, all is in favour of an earlier marriage. [Counsel referred to *Re Turner, Glenister v. Harding* (5), *Re Stollery, Weir v. Treasury Solicitor* (6), *Piers v. Piers* (1), *Breadalbane Case*, *Campbell v. Campbell* (3), *De Thoren v. A.-G.* (7), *Sastry Velaider Aronegary v. Sembecutty Vaigalie* (8), *Re Thompson, Langham v.*

E *Thompson* (4), *Shedden & Shedden v. A.-G. & Patrick & Patrick* (9), *Collins v. Bishop* (10), *Goodman v. Goodman* (11), *Re Shephard, George v. Thyer* (12), *Re Haynes, Haynes v. Carter* (13), and *Fox v. Bearblock* (14).]

Romer, K.C., in reply.

F BENNETT, J. : The point to be decided in this action is whether the first and second defendants, Mrs. Willis and Mr. Hercules Bradshaw, are legitimate children of the late Arthur Evelyn Bradshaw and the late Elizabeth Jenson, to whom I shall hereafter refer as the parents. It is common ground that the parents were respectively the father and mother

G of the said defendants. Mrs. Willis was born on Aug. 31, 1893. Mr. Hercules Bradshaw was born on Aug. 8, 1897. The question is whether the parents were married before Aug. 31, 1893. There is in evidence a marriage certificate relating to the marriage of the parents which proves that they went through a ceremony of marriage at the parish church

H of Fulham on Nov. 22, 1898.

On behalf of the defendants, it was submitted that, notwithstanding this certificate, the court ought to decide that the parents were married before 1893, acting partly upon the strong legal presumption of marriage arising upon proof of cohabitation of a man and woman as husband and wife, with the reputation that they were married, and partly upon

evidence consisting of the declarations of the parents, at dates earlier than 1893, that they were married. The submission was that the court ought to decide that the parents had been married either in 1889 or in 1890, preferably in Nov., 1890.

In my judgment, it is not possible to accept the submission made on behalf of the defendants, or to act either on the legal presumption or on the declarations and statements of the parents themselves. The marriage certificate relating to the marriage on Nov. 22, 1898, is, to my mind, the answer to the defendants' submissions. A

The defendants have proved to my satisfaction that the parents did live together as man and wife from some date in 1890, and for many years thereafter, and that they did during that period enjoy the reputation of being married persons. The proof consists in five birth certificates and five baptismal certificates relating to five children of the parents, all born before Nov., 1898. These certificates prove that the parents were living together as man and wife, and the fact that, in the birth certificates and in the baptismal certificates, the surname of the mother is stated to be Bradshaw is proof, I think, that the parents enjoyed the reputation of being married persons. The defendants have also proved that from time to time statements were made by both parents to the effect that they had been married. One witness, Mr. Williams, a solicitor, who witnessed the marriage ceremony performed on Nov. 22, 1898, deposed to a statement made to him by Mr. A. E. Bradshaw that he had married Elizabeth Jenson in Scotland. If the only material before me had consisted of the birth and baptismal certificates, and the declarations of the parents, I think that I should have been bound to hold that the parents had been married before 1893. I think, however, that the marriage certificate relating to the ceremony performed on Nov. 22, 1898, and the statements of fact contained in it, rebut any legal presumption, and render the statements of the parents of very little value. B C D E

From the marriage certificate, it appears that the marriage register which the parents signed described the parents as having the quality of a bachelor and that of a spinster, respectively. It also appears that the ceremony was performed after banns. The parents must have known that they were described as a bachelor and a spinster in the marriage register, and must have known that they had been so described publicly on three occasions when their banns were called. I cannot bring myself to believe that they would have permitted these things to be done if the truth had been that they had been validly married to each other many years earlier. The conclusion at which I have arrived is that the marriage which is proved to have taken place on Nov. 22, 1898, rebuts the legal presumption which might otherwise arise from the facts proved on behalf of the defendants Mrs. Willis and Mr. Hercules Bradshaw, and destroys the value of the statements and declarations of the parents, and that the parents were not married to one another until Nov. 22, 1898. F G H

Declaration that A. E. Bradshaw and Elizabeth Jenson were not

married before Nov. 22, 1898, and that Mrs. Willis and Hercules Bradshaw were not entitled to share in the residuary estate of William Bradshaw.

Solicitors: *Speechly, Mumford & Craig* (for the plaintiff); *Vyvyan G. H. Hicks* (for the first and second defendants); *Hunters* (for the third defendant); *Reynolds, Sons & Gorst* (for the trustees of the will).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

Considered. Re ST. GEORGE'S,
SOUTHALL. [1952] 1 All E.R. 323.

Re ST. HILARY, CORNWALL, KING v. ROFFE-SILVESTER.

[COURT OF ARCHES (W. N. Stable, K.C., sitting as Deputy Dean of Arches), **October 21, 1938.**]

Ecclesiastical Law—Ornaments—Stone altars—Aumbries—Sanctuary lights—Faculty jurisdiction.

The holy table in a parish church is neither an ornament nor a decoration, but in a category by itself.

There must, in a parish church, be a holy table, which must not be a stone altar, but must be made of wood. Once there is one such holy table, there may be subsidiary stone altars. If these have been erected, the chancellor has a discretion to refrain from issuing a faculty authorising the removal of all or any of them, and he may, in the exercise of his discretion, grant a faculty authorising their retention.

Tabernacles or aumbries placed in a church without the authority of a faculty must be removed, together with the sanctuary lights used with them.

The order of a Consistory Court in the exercise of its faculty jurisdiction has now no coercive powers, but is a mere authority or licence issued to some person or persons permitting, and not requiring, something to be done.

[**EDITORIAL NOTE.** Whilst the present judgment must to a certain extent be construed as only applying to the particular circumstances which existed in the parish in question, yet some subjects, particularly the legality of stone altars, are dealt with in a general way. It must be remembered that the court is here exercising its faculty jurisdiction, and is not directly concerned with the irregularity or illegality of the services which in the past had been held there.

AS TO ILLEGAL ORNAMENTS, see HALSBURY, Hailsham Edn., Vol. 11, pp. 786-793, paras. 1445-1456; and FOR CASES, see DIGEST, Vol. 19, pp. 435-450, Nos. 2762-2947.]

Cases referred to:

(1) *Matthews v. King*, [1934] 1 K.B. 505; Digest Supp.; 103 L.J.K.B. 509; 150 L.T. 133.

(2) *Faulkner v. Litchfield & Stearn* (1845), 1 Rob. Eccl. 184; 19 Digest 438, 2781; 5 L.T.O.S. 21.

(3) *Liddell v. Westerton* (1857), Brod. & F. 117; 19 Digest 435, 2762; 29 L.T.O.S. 54; subsequent proceedings, sub nom. *Liddell v. Beal* (1860), 14 Moo. P.C.C. 1.

(4) *Hayes (Rector, etc.) v. Fulford*, [1910] P. 18; 19 Digest 438, 2776.

APPEAL by the Rev. C. G. Roffe-Silvester, vicar of the parish of St. Hilary, Cornwall, and one of his churchwardens, from the decision of SIR MONTAGU GRAHAM-HARRISON, Chancellor of the diocese of Truro, ordering

the removal from the church of various ornaments alleged to have been placed there without a faculty by the Rev. Bernard Walke, the former vicar of the parish, and to be illegal.

H. B. Vaisey, K.C., and *Geoffrey C. Hutchinson* for the appellants.

J. P. Ashworth for the respondent.

W. N. STABLE, K.C.: Before coming to the matters in issue, it is necessary to go back a number of years and to set out certain facts which, though not directly relevant, will help, I hope, to render what follows intelligible. The present litigation, which was initiated by a petition presented to the Consistory Court of the diocese of Truro in the exercise of what is known as its faculty jurisdiction, is concerned with a number of articles now in the church of St. Hilary. To avoid misunderstanding, throughout this judgment I shall use the word "ornament" strictly in its technical sense, as meaning all the several articles used in the performance of the services and rites of the church. Articles—as, for example, images, pictures and stained-glass windows—which are not ornaments in the strict sense I shall call decorations. I shall use the word "article" in a comprehensive sense, including anything that may fall into either of the above categories.

St. Hilary's is the church of a parish in Cornwall with a population of some 700 souls. The parish is an ancient one, and the church which was in existence up to 1853 was apparently built in the fifteenth century. In 1853, this old church was burnt down, and immediately afterwards the present building was erected on the site of the old church. I am told, though the fact is not really material, that the church built in 1853 was a new church, and not a restoration of the old building. The living was at all material times in the gift of the dean and chapter of Truro Cathedral.

In 1912, the Rev. Nicolo Bernard Walke was appointed to the living of St. Hilary, and he was the incumbent until 1936, when he retired in consequence of failing health. In or about 1933, Mr. Walke, as a result of ill-health, was prevented from discharging the duties of his cure, but the omission was supplied by other clergymen from a number of other parishes, the names of which are recorded on a tablet to which I shall have occasion to refer later. Mr. Walke is not a party to these proceedings, but it is common ground that the articles the subject-matter of this litigation, with the exception of the old font, which was utilised by Mr. Walke as a stoup containing holy water, were all introduced into the church during his incumbency, and either by him or with his knowledge and approval, and that in no case were there observed the provisions of the law which exist for the purpose of safeguarding our parish churches and the rights of the parishioners and others, and of posterity, and which necessitate a proper application to the appropriate Consistory Court for a faculty before articles can be brought into, or other structural alterations made in, a church. In fact, throughout the whole of Mr. Walke's

incumbency, the existence of the Consistory Court was ignored, and, as will hereinafter appear, its jurisdiction was defied. Mr. Walke himself did not admit that he was under any obligation to the Consistory Court, and I am told that, in the course of the earlier proceedings, a letter from him to this effect was published in the press. I have not seen this letter.

- A The present petition was presented to the court on Aug. 28, 1937, by Miss Anna Maria King, a parishioner of the parish of St. Hilary, who has lived in the parish for nearly 40 years. On Nov. 4, 1937, an appearance was entered on behalf of the Rev. Charles Geoffrey Roffe-Silvester, then and now vicar of the parish, and Henry Reginald Hope, a parishioner and
- B one of the churchwardens. Although Miss King was the sole petitioner, it is clear from certain resolutions of the parochial church council that she had the support of a majority of the council. I do not know when a parochial church council first came into existence in this parish. In the judgment which was given on Mar. 9, 1932, in the earlier proceedings, it
- C appears that there was no parochial church council of the parish in existence at that time. The petitioner in the present proceedings prayed that the chancellor would decree a faculty authorising the vicar and churchwardens of the parish to remove out of the parish church of St. Hilary the articles specified in a schedule attached to the petition.
- D These articles were 23 in number. The respondents to the petition by whom an appearance was entered duly filed their statement of objections, and prayed that Miss King's petition be dismissed. They asked for a confirmatory faculty for each of the 23 articles, with the exception of two numbered respectively 18 and 22 in the schedule, and consisting of
- E six silvered glass globes, which have been described as "witch-watching balls," hanging between the arches in the chancel, and a wood model of a house, hanging on the east wall of the north chancel aisle, with an inscription on it. Whether the so-called "witch-watching balls" had any significance, or existed for any purpose other than that of illuminating
- F the church by reflecting the lights of the lamps or candles, I do not know, nor indeed does it matter, as the chancellor has authorised the removal of both these items from the church, and as to them there is no appeal.

To revert to the history of the parish, it appears from the judgment of the Consistory Court in the earlier proceedings that during his incumbency

G Mr. Walke habitually held in the church services which bore little or no resemblance to the services to be found in the Book of Common Prayer. In fact it seems doubtful whether Mr. Walke held in the church any services out of the Book of Common Prayer, or any which bore any real resemblance to those services. I am not here to decide questions of

H ritual, much less the practices of Mr. Walke, who is not a party to these proceedings, but these facts cannot be ignored, as they provide a part of the explanation of conduct on the part of the petitioner on which Mr. Vaisey, at one time in the course of his argument, laid some stress, as disentitling her from invoking the jurisdiction of the Consistory Court. It is sufficient for this purpose if I quote one short passage from

the judgment of SIR PHILIP BAKER WILBRAHAM in the earlier proceedings. He said :

It is clear that many, at any rate, of the services held at St. Hilary's go far beyond what is permissible in the Church of England.

As I have already stated, until some date subsequent to 1932 there was no parochial church council in existence in this parish. On May 26, 1931, however, a number of parishioners, of whom Miss King, the present petitioner, was one, presented to the Consistory Court a petition asking in substance for the removal from the parish church of 16 different articles, all of which had been introduced without a faculty—that is to say, in an illegal manner. These articles comprised five stone altars, a tabernacle, two crucifixes, a number of pictures, a sanctus bell, a canopy or *baldacchino* over the holy table and a monstrance. This petition initiated what I have referred to, and what I shall continue to refer to, as the earlier proceedings. The grounds on which the petition was based may be summarised as follow : that each of the articles had been placed within the church since its consecration without a faculty, that each was an illegal ornament or decoration, and that each was likely to be, and in fact was, the object of superstitious use, and of superstitious reverence and regard. It is unnecessary to examine in detail the vicissitudes which attended the institution and conduct of the earlier proceedings, except to say that, on July 15, 1931, a copy of the citation was served on Mr. Walke personally, but no appearance was entered by him or by either of the then churchwardens. Mr. Walke, in a written statement supplied to the chancellor, explained that he was unable, on what he described as grounds of conscience, to recognise the jurisdiction of the court.

An appearance was, however, entered on behalf of the Archdeacon of Cornwall, but, to his own regret, the chancellor was compelled to rule that the archdeacon had no *locus standi*. It was pointed out when the chancellor delivered his judgment in the earlier proceedings, and should be repeated here for the purpose of avoiding misunderstanding, that the archdeacon would not have attempted to justify the retention in the church of all the articles complained of in that petition. Unfortunately, through no fault of Miss King or her associates, but as a direct consequence of the inability of the then incumbent to recognise an existing fact—namely, that the jurisdiction in a matter of this kind is in the Consistory Court—the petitioners were the only parties then heard. SIR PHILIP BAKER WILBRAHAM delivered his judgment on Mar. 9, 1932, the consequent order being drawn up on Apr. 14, 1932. To this judgment I shall have occasion to refer later. In dealing with other aspects of this case, the chancellor, in the course of the judgment from which this appeal is brought, deplored the fact that he had before him only an abbreviated version of his predecessor's judgment. I have been more fortunately placed, inasmuch as I have been provided with a transcript of a shorthand note of that judgment, which has been copied and rendered available to counsel on each side, and they have, as I understand it, accepted this

transcript as containing a correct record of the earlier judgment. For the purpose of these introductory remarks, the important feature of this judgment and what followed it is this. An order was made for the removal from the church of a number of the articles of which complaint was made. To put the matter more accurately, an order was made

- A** authorising the then vicar and churchwardens to remove the articles. In default of their acting on this authority the order authorised the petitioners to remove them. The then vicar and churchwardens, as may readily be believed, took no action directed to give effect to the chancellor's determination of the rights in the matter, and accordingly the authority
- B** in favour of Miss King became operative and was acted upon, and the articles which the chancellor had decided, in the existing circumstances, to be illegal were removed. The articles which were authorised to be removed, if they ever were removed at all, were immediately replaced, by or with the connivance of the then vicar, in the places
- C** in the church which they had previously occupied. There were exceptions of no materiality, but which I mention so as to indicate that I have not overlooked them : a stone which contained an inscription was removed and was not replaced, probably for the reason that the stone immediately behind it, and which was exposed to view by the removal, contained
- D** an exactly identical inscription, and a monstrance and a canopy over one of the altars disappeared from the scene. This state of facts would have been bad enough. What actually happened was worse still. In fact, the articles that were removed from the church were not the original articles at all, but, in the interval which decency and good order prescribes
- E** between the date of the making of the order and its execution, the then vicar caused or permitted imitations or fakes to be made and put up in the place of the originals, for the purpose of deceiving the persons by whom the order was executed. Accordingly, as a result of this carefully-planned stratagem, when the licence of the chancellor came to be executed,
- F** the originals had been removed to a place of safety, which was illegal, and the fakes had been put up in their place, which was dishonest. The order or licence was executed on the fakes, and the originals were immediately put back in those places from which they had been taken. This evidence was apparently accepted as representing the true state of
- G** facts by the chancellor in the court below. In any event, it is abundantly plain that the law was deliberately flouted and defied.

- It is important at this stage to make two observations. First, the conduct to which I have just referred had nothing whatever to do with Mr. Roffe-Silvester, the present incumbent. He was not connected with
- H** the parish at that time, and in his personal capacity cannot be held to be responsible for such conduct in any way. Moreover, from the consistently proper attitude which Mr. Roffe-Silvester has maintained in these proceedings in this court and in the court below, it is, I think, clear that he would be the first to deplore methods such as those which I have described. Secondly, when I say that the law was flouted and

defied, I am not moved by any particular tenderness towards the dignity of the law or the dignity of any particular court. Where a number of people are united in a community, whether it be a community such as the Anglican Church, which is established by law, or a community created and governed by contract, the mutual rights, obligations and duties of the members of the community must be measured and determined by rules of some kind. In the case of an association such as a trade union, those rights, obligations and duties are defined by rules which the members contract to observe. In the church, that institution being established by law; the rights, duties and obligations of its members are defined by the law of the land, and are protected and preserved by the courts, which exist for the purpose of seeing that the laws are observed and obeyed. The illegality which I have outlined was a deliberate deprivation of Miss King and others of those rights which they, as parishioners, enjoyed in this building. Having instituted proceedings in the appropriate court, and having obtained an order which to some extent was the order they sought, they were placed in the humiliating and impossible position of finding the rights which they were entitled to enjoy, and which they had asserted and established by legal, orderly and proper process, instantly and immediately snatched away from them by conduct which it would be charitable to describe merely as being grossly illegal. As must inevitably be the case when people are robbed of the rights which the law accords them, and which the law is supposed to protect, and, if necessary, enforce, these people were driven to adopt a course of conduct of which it is impossible to approve. It is with reluctance that I deal with this aspect of the matter. The facts can be stated all the more shortly for reasons of happy augury which will hereafter, in the course of this judgment, appear. Miss King and others who had suffered as she had suffered made it a practice to attend the church and place themselves in a prominent pew during the celebration of services of which they disapproved, not for the purpose of taking any part in the worship, but as a protest against what was going on. On one occasion, Miss King was guilty of brawling in the church, and, after an application to the Divisional Court—*Matthews v. King* (1)—was convicted by the local magistrates and subjected to a nominal fine. The chancellor, in his judgment in the court below, expressed his disapproval of the entirely mistaken conception of duty which prompted this behaviour. Beyond associating myself with what fell from the chancellor on this matter, which lost nothing in emphasis from the moderation of the language in which it was couched, I say no more, except that, though I am shocked at what Miss King did, I cannot say that I am surprised. Miss King had been a parishioner for many years. For a matter of close on a quarter of a century her rights, not only in matters connected with the ornaments and decorations of her parish church, but also in the services which she was entitled by law to have celebrated therein, were consistently ignored, and, when she obtained legal redress

for some of the injury she had sustained, that redress was rendered nugatory by further acts of lawlessness on the part of her parish priest. The worst feature of this aspect of the case is that this behaviour was continued during the incumbency of Mr. Roffe-Silvester. For this there was no excuse. Happily, these episodes are now ended. In the course of the hearing of this appeal, Mr. Ashworth, on behalf of Miss King, volunteered an undertaking that this course of conduct should not be repeated. This was not the sort of undertaking volunteered by an adroit and tactful advocate to escape from what he knows to be an untenable position. It was a suggestion, as I was able to observe, graciously and spontaneously put forward by Miss King herself to her counsel, and it was immediately, and as graciously, welcomed and accepted by the vicar, through the mouthpiece of his leading counsel, Mr. Vaisey. Reverting to the history which led up to these proceedings, Mr. Roffe-Silvester, who succeeded Mr. Walke, started his active duties on or about May 19, 1937. The chancellor has found—and I freely and gladly accept his findings, which have been confirmed by Mr. Roffe-Silvester's attitude throughout this appeal—that Mr. Roffe-Silvester came to the parish with every intention of being a good parish priest to all parties in the parish in the very difficult circumstances for which he was in no way responsible. He had, as the chancellor points out, and as was emphasised by the Lord Bishop in an address he gave in the parish when Mr. Roffe-Silvester was instituted, to hold the balance between an Anglo-Catholic party, consisting of members some more and some less extreme, and a party holding extreme Protestant views. Unfortunately, the long period of lawlessness, amounting almost to persecution, which preceded his incumbency had borne its inevitable harvest. His reception was not encouraging. On Apr. 19, 1937, the parochial church council passed two resolutions, each by a majority. The first stated that the council objected, and was irrevocably opposed, to the appointment, on the ground that the nominee of the dean and chapter had systematically practised idolatry. The second was directed to the formation of a committee to go into the matter of obtaining a faculty for removing illegal ornaments. At some later date, the parochial church council, by a majority of 12 votes to 9, passed a resolution supporting the petition of Miss King in the present proceedings.

It is to be deplored that, with the arrival of a new vicar, everybody connected with the parish should not have endeavoured to start a new page, but I cannot forget, as no doubt Miss King did not forget, the injustice of the preceding period of nearly a quarter of a century. It is, I believe, in the long run fortunate that evil has evil consequences, but, fortunate or unfortunate, the sort of wrongs and grievances under which this parish suffered for years cannot be put right in a day. Perusal of the petition which initiated the present proceedings shows that the articles scheduled in the petition comprised for the most part articles which had been dealt with by the preceding chancellor

in the earlier proceedings. In addition, the schedule contained other articles which, since the date of the earlier order, had been introduced into the church by or with the approval of Mr. Walke, and, as it is hardly necessary to add, without a faculty. It was but faintly argued by either side that, so far as the articles in the present proceedings had been dealt with in the earlier ones, the matter was *res judicata*. A
 For the reasons given by the chancellor, I reject this submission, if, indeed, it was ever really put forward. While, of course, the utmost weight was attached, both here and in the court below, to every finding of law in the judgment in the earlier proceedings, the facts in the two cases are different, and, in my view, the chancellor from whom this appeal is B
 brought was right in taking the view that decorations which might well have been illegal during the incumbency of Mr. Walke, owing to actual or apprehended misuse, can with safety be left in the church to-day.

Accordingly, as regards a number of articles, the chancellor rejected the plea of Miss King, and granted a faculty for their retention in the church, subject to certain sufficient and proper safeguards. From that C
 part of the order which was not in favour of Miss King, to use a term which I dislike in this context, but which I use for the sake of brevity, there has been no appeal. In my judgment, this affords one indication that Miss King is actuated by the desire to see the law vindicated and the D
 rights common to herself and the other parishioners recognised, established and protected, and that she is not actuated by the wish to prolong or extend the discord which has inevitably and most unhappily existed in the parish for something like a quarter of a century. Equally, it is apparent that Mr. Roffe-Silvester, on his side, has been actuated by the E
 desire to do his duty and to bring peace and harmony to a distracted flock. If everyone concerned will follow these excellent examples, there is good reason to hope that this litigation will mark not only the end of an epoch which, though doubtless productive of much good, has also wrought much harm, but also the inauguration of a new and happier F
 and more Christian state of affairs in the parish.

Before turning to the specific articles which are the subject-matter of this appeal, Mr. Vaisey made two submissions of general application with which I ought to deal. The first was that the Consistory Court, in view of the past conduct of Miss King, prolonged as it was into the G
 incumbency of Mr. Roffe-Silvester, and, indeed, up to the hearing in the Consistory Court, ought to refuse even to entertain Miss King's application, regardless of its merits. In view of the atmosphere of conciliation which seemed to me to be gaining ground as the appeal progressed, this argument, though not actually abandoned by Mr. Vaisey, was not H
 pressed. I reject it *in toto*. It is impossible to apply to proceedings such as these tests the same as those which would be properly applicable in civil proceedings, where merely the individual rights of the parties before the court are involved. I have referred to the parties in this case. It would be more accurate to describe the parties as spokesmen, and,

though each has a personal interest in the matter, there are many others whose interests are directly involved but whose names do not appear as parties on the record. I go further, however. Even if Miss King stood alone in this matter, it would be deplorable if a parishioner who had been deprived of her legal rights for a long period of years should be for ever precluded from asserting them solely by reason of conduct, however ill-considered, which was the direct, if not the inevitable, consequence of the denial of the protection to which she was entitled.

Mr. Vaisey secondly argued that Miss King's motive, and her only motive, was to put an end to services, ceremonies and practices which she disliked, and of which she disapproved, and that the faculty jurisdiction of the Consistory Court ought not to be used for the purpose of enforcing discipline on the clergy, for which other machinery is available. It is sufficient to dispose of this contention, as applied to the facts of this case, by holding, as I do hold, that it was not Miss King's sole motive to put a stop to illegal services. During the incumbency of Mr. Walke, there can be no doubt that there were services which she disliked, and of which she disapproved, but dislike of the services does not preclude her from disliking illegal ornaments or illegal decorations. Miss King disliked both Mr. Walke's services and the ornaments and decorations which he introduced into the church. Her principal motive is, I think, the very proper one of rescuing the law from the contempt into which it has fallen and establishing the rights of church people, including the right to have those rights determined in accordance with the law, and not in accordance with the caprice or whim of any particular individual. Moreover, since a test—and, as Mr. Vaisey argues, the only test—of the legality of a decoration is whether or not it is, or is likely to be, connected with superstitious regard, or illegal use, it follows that some investigation into the services and practices which prevail in a particular church must be made where these issues are involved in a faculty suit.

I will now deal with the specific articles which are the subject-matter of this appeal. The first series of articles consists of six stone altars fixed to the body of the church, three at the east end, one each on the north and south walls, and the sixth on the west wall, of the church. Five of these altars were comprised in the earlier proceedings. One of them, placed in the south-east corner of the church, was erected in 1934, as I have already pointed out, without a faculty. To avoid misunderstanding, in this judgment I shall use the terms "holy table" and "illegal altar" as meaning, respectively, a communion table which in all respects complies with the law, and one which does not comply with the law, and I shall employ the word "altar" as a neutral and comprehensive term. In passing, I would point out that the chancellor in the earlier proceedings expressed himself bound to hold that the five stone altars, which were the only altars in the church at that time, were illegal, but he made no order for their removal. This was without prejudice to the con-

sideration at some future date of a scheme for dealing with them, or some of them, should it be found necessary, but he expressed the hope that it might prove unnecessary to disturb them. Soon after the Reformation, a controversy as to the rival merits of the stone altar and the holy table of wood arose, and raged round the actual words themselves, and the material out of which the article was made. The altar of stone was regarded by some as indicative of the celebration of the sacrifice of the real presence, while the table of wood was regarded as appropriate to the conception of a commemoration or feast. If there is anyone left who wishes to study this controversy, he will find in the judgment of SIR HERBERT JENNER FUST, in *Faulkner v. Litchfield & Stearn* (2) to which I shall refer later on, a storehouse of learning on this topic.

In 1559, in an injunction issued by Queen Elizabeth, there appears this passage :

... in the order whereof [of altars and holy tables], saving for an uniformity, there seemeth no matter of great moment, so that the sacrament be duly and reverently ministered . . .

That the matter cannot have gained in importance since then is shown by the following facts. The word "altar" is used continually in the order of the coronation service. It appears in Acts of Parliament relating to churches, and it is, and has been for years, in habitual use on the lips of many churchmen as synonymous with "holy table." There was in evidence before me, in the form of an agreed statement of facts, certain schedules, which can be treated as incorporated in this judgment. They show that, in addition to some pre-Reformation stone altars, stone altars have been installed in new churches, or when an old church has been rebuilt after destruction, in a number of cases as far back as 1839, and as recently as 1937 and 1938, that these churches are distributed among 15 different dioceses, and that stone altars have been installed by faculty in no less than 14 dioceses, the most recent example being in 1938, though it was conceded that in none of the cases where a faculty was granted had there been any opposition or hearing. It was also admitted, and is probably common knowledge, that Westminster Abbey and a number of other extra parochial churches have stone altars. I venture to think that the vast majority of church-going people, when they attend a celebration of Holy Communion, do not attach any significance whatever to the material of which the holy table is made, or whether it is called "the altar" or "the Lord's table" or "the holy table." This is, however, only a surmise on my part, and there is no evidence before me to support it.

It is the question of these stone altars which, in my judgment, gives rise to the only questions of law of any real difficulty in this case. As it is certain that the chancellor will have at some later date to consider the practical application of the order he has made, so far as it is affected by this judgment, it will be convenient, I think, if I set out what I think, taking the order and the material passages in his judgment, that the

chancellor has decided. In my judgment, he held : (i) that each of the altars, being made of stone, and immovable, is illegal *per se* ; (ii) that, the altar being illegal, the chancellor, as a matter of law, and not of discretion, is precluded from granting a confirmatory faculty for any one of them ; (iii) that, though in a very exceptional case, as where the
A stability of the building might be endangered by the removal of an altar, he may have a discretion, in each of the six cases before him he has no discretion in the matter, but must as a matter of law decree a faculty for its removal ; and (iv) that each of the six altars was on the same footing, and must receive the same treatment. In coming to this
B decision, the chancellor felt himself compelled (I take the word from his judgment) by the authorities cited to him and to me to take the course he did. Accordingly, he made an order which in effect authorised the removal of the six altars, subject to the work being done under his supervision, a necessary and proper safeguard. It therefore becomes
C necessary to consider the authorities which compelled the chancellor to come to this conclusion. The first is *Faulkner v. Litchfield & Stearn* (2), where it was held, reversing a decree of the Consistory Court of Ely, that the stone altar in a parish church was illegal, and that, accordingly, no confirmatory faculty could be issued. The Dean of the Arches in that
D case stated quite clearly that the refusal of a confirmatory faculty was not a matter of discretion, but of law. The basis of that decision was that the stone altar in question was not an ornament. If it had been an ornament, it would have been protected by the ornaments rubric, which can be found in the Prayer Book immediately before the Order for
E Morning Prayer. The passage in the judgment to which I have just referred is as follows, at p. 254 :

There were two or three arguments urged by the counsel for the respondents, which I will not pass over unnoticed. One was founded on the order in the Prayer Book, which immediately precedes the morning service ; “ that such ornaments of the church . . . shall be retained and be in use, as were in this Church of
F England by the authority of Parliament, in the second year of the reign of King Edward VI ” ; and it was contended that, as stone altars were then in use, they, being ornaments, are now to be retained. To be sure, were that argument valid, not only is this stone altar or table proper, but no other species of table ought to be erected. Durandus was cited to shew that the altar is to be considered an ornament ; but it seems to me that that writer is an authority the other way ; . . . The altar is nowhere, that I can find, enumerated amongst the ornaments
G of the church or choir.

This decision was considered 10 years later in *Liddell v. Westerton* (3), which was heard by Dr. Lushington in the Consistory Court, by Sir John Dodson in the Court of Arches, and ultimately in the Privy Council. Each one of those courts followed the decision in *Faulkner v. Litchfield & Stearn* (2) and approved the reasoning on which it was based. Mr. Vaisey
H has contended that these decisions are now obsolete, inasmuch as, since they decided that the altar is not an ornament, it must follow that it is a decoration, and that later decisions of equal authority decide that the test—and the only test—of the legality of a decoration is whether or not it is, or is likely to be, connected with superstitious regard or illegal use.

While I felt the full force of his argument, in my judgment, this court, like the Consistory Court, is bound by the two decisions, and accordingly must hold that the altar of a parochial church, if made of stone, is illegal, and that, where the altar in a parish church is of stone, no confirmatory faculty can be issued for its retention. Whether these judgments on these matters are to-day open to review in the light of more recent cases is a question which, in my judgment, must be left to the determination of the Privy Council. A

The next point I have to consider is whether the chancellor was right in deciding that he must treat all of these six altars alike. If there had been only one altar, and that an altar of stone, in the church, in my judgment, on the facts and circumstances of this case, the chancellor would have been compelled to authorise the removal of that altar, and to substitute the holy table which the law prescribes. Mr. Vaisey contended that, even so, as there were six altars, the chancellor was not compelled to authorise the removal of any one of them, but that the right course to pursue was an application for authority to put up a holy table. C
In my judgment, this submission goes too far. Each of the offending altars cannot, I think, succeed in establishing a sort of ecclesiastical *alibi* because of the presence of the remaining five. The place now occupied by what is described as the high altar—an expression which, so far as I know, has no particular significance in an Anglican church—is the place where the holy table, which was illegally moved without a faculty, used to stand. D
Whether or not the chancellor has a discretion in the matter, in my judgment, his decision on this point was right in substance, and the order which directed the removal of the high altar and the substitution of a holy table must stand. E
However, once that has been effected, and once the church has been equipped with its holy table, in my judgment, the situation of the remaining five altars is wholly changed. F
Faulkner v. Litchfield & Stearn (2) and *Liddell v. Westerton* (3) decided that every church must have a holy table, and that the holy table must be movable, and made of a certain material—namely, wood. Those decisions, in my judgment, have no bearing on what I may call subsidiary altars in chapels or side aisles of a parish church.

It must be remembered that, in 1845 and 1855, when the two cases to which I have referred were respectively decided, although there may have been in existence parochial churches containing two altars, it was not until many years later that any application was made for a faculty for a second holy table in a parochial church. G
At that time—namely, in 1845 and 1855—it was contemplated that every parochial church must have one holy table, and one holy table alone, and those cases were directed to that state of facts, and to nothing else. H
To state it shortly, in my judgment, the holy table of a particular church was put into a category by itself, and not into the category either of ornaments or of decorations. Once a parochial church is properly equipped with its holy table, any subsidiary altar, in my judgment, must be treated as a decoration, and

- must be subject to the same tests as those which are applicable to decorations as such. By this I do not mean, and I must not be understood to mean, that the chancellor, when he comes to consider what is to be done with each of the altars now in question, should lose sight of the fact that they are in appearance altars, and are intended to be used as
- A such. As I have already said, every parochial church must have its holy table. Subject to this, the significance attached to the word "altar" is derived from the use to which it is put. So far as I know, there is no service prescribed for the consecration of an altar as such. An altar is consecrated with the rest of the church in which it is situated. The
- B judgment I have expressed on this point is confirmed by the numerous decisions, all much later in date than 1855, in which faculties have issued for the installation of a second altar in a church. The holy table in a church must be made of wood, and must also, it appears, be movable, but, where faculties have been issued for the installation of a second
- C altar, the faculty, as a general rule, if not invariably, prescribes that the second altar shall be in a particular place. In fact, emphasis has been laid in some cases on the fact that the place where a second altar is authorised is either a side chapel or closed in to such an extent as to be almost a separate entity, which negatives the view that a second or
- D subsidiary altar is on all fours with the holy table of the church. Moreover, if the decisions in *Faulkner v. Litchfield & Stearn* (2) and *Liddell v. Westerton* (3) only deal with the holy table of a parish church as such, and do not declare that every altar made of any material but wood must be *ipso facto* illegal in the Anglican Church, this affords at once an
- E explanation why, in extra-parochial churches, from Westminster Abbey downwards, altars of stone are constantly found. Even if this view is wrong, and if every altar in a church stands on the same footing, and is governed by the two decisions I have cited, there yet remains the question whether the chancellor—granted that a stone altar is illegal
- F *per se*, and granted that he has no jurisdiction to issue either a faculty for the introduction of a stone altar into a church or a confirmatory faculty where he finds one installed—is bound to issue a faculty authorising the removal of the altar, regardless of all other considerations, and even though it may have stood in the church for centuries, and
- G though the unanimous desire of the parishioners is to have it retained.

In my judgment, in regard to the high altar in the present case, the question is one of merely academic importance. I have already indicated that, on the facts of this case, that altar must go, and the holy table must be put in its place. After considerable hesitation, I have come to

H the conclusion that the chancellor has a discretion in the matter, and that I am not precluded by authority from holding the contrary. It must be remembered that, while in 1855 a Consistory Court in the exercise of its faculty jurisdiction could order the churchwardens to remove a particular article from the church, which monition, in the event of disobedience, could be enforced, I believe, by excommunication, the

Consistory Courts to-day in the exercise of their faculty jurisdiction have no coercive powers. The order of the court is not really an order at all, but an authority or licence issued to some person or persons permitting—not requiring—something to be done. Consequently, if the altar of a parochial church were made of stone, and no application were made for a faculty for its removal, or if application were made, and a faculty issued, but no action taken thereon, the altar would remain where it was, with the result that the discretion would then seem to lie, not in the court, but in the parishioners—a state of affairs wholly unsupported by authority, and contrary to reason and common sense. A

The view that there is a discretion is further fortified by a passage from *Hayes (Rector, etc.) v. Fulford* (4), at p. 21 : B

I should mention that the practice is, where a stone altar is found in a church that has been there probably since the Reformation, not to remove it.

It is true that there is no trace of any case, certainly not in modern times, where a parishioner has had the temerity to apply for a faculty authorising the removal of an altar made of stone which has stood in a parish church since pre-Reformation times. If such an application were made, in my judgment, it could only be refused on the ground that the chancellor had a discretion in the matter, unless it is said that the fact that a particular altar has, centuries ago, been used in connection with what some people may regard as an idolatrous and heretical rite affords a sound basis for its retention in an Anglican church, and gives it priority over other altars almost equal in age but introduced after the Reformation. Mr. Ashworth, in the course of his admirable argument, urged on me that the authorities establish that the chancellor has no discretion in the matter. He was unable to call my attention to any decision directly on the point that, where an illegal article has been placed in a church, and an application is made for a faculty to remove it, the chancellor has no discretion to make an order, but must, regardless of all other considerations, decree the removal of the article because of its illegality. He said, however, that that was the effect of the decisions in *Faulkner v. Litchfield & Stearn* (2) and *Liddell v. Westerton* (3). In *Faulkner v. Litchfield & Stearn* (2), the churchwardens prayed for a confirmatory faculty of the stone altar which they had placed in the church. The vicar resisted the application, and, as appears quite clearly from the pleadings in that case, cross-petitioned for a monition directing the churchwardens to remove the stone altar and substitute a holy table made of wood, and movable, in its place. On appeal to the Court of Arches, the whole cause was retained by that court, and, as appears from the order that was made, which is set out at the end of the report, the decision of the Consistory Court was reversed. The prayer for the confirmatory faculty was rejected, and the order went on to reject the prayer made on behalf of the vicar that the churchwardens be monished to take down and remove the communion table of stone. Neither in the pleading nor, so far as appears from the report, in the course of the C D E F G H

argument was it so much as suggested that the Court of the Arches had no jurisdiction to entertain the prayer for monition. SIR HERBERT JENNER FUST, who was the Dean of the Arches and the Master of Trinity Hall, and whose judgment in that case is a monument of learning and research, said, at p. 259 :

A In coming to this conclusion, I do not go so far as to admonish the churchwardens to remove them [the illegal altar and the illegal credence table]. All I can do is to refuse to confirm the sentence of the court below.

B When one looks at the report, it would appear that SIR HERBERT JENNER FUST considered that he had a discretion limited to making no order for removal, for, while he refused the confirmatory faculty, he rejected the prayer for a monition to have the offending altar removed. Mr. Ashworth, however, contended that this omission on the part of SIR HERBERT JENNER FUST was explained in *Liddell v. Westerton* (3), both by Dr. Lushington in the Consistory Court, and by Sir John Dodson when the case came on appeal to the Court of Arches. Dr. Lushington dealt with the matter in this way :

C In the case of *Faulkner v. Litchfield & Stearn* (2), SIR HERBERT JENNER FUST reversed the decree of the court below, granting the faculty which had been prayed, but he did not admonish the churchwardens to remove the communion table or the credence table. It is necessary to explain why the decree was made in that form. The proceeding before the Court of Arches was not an original suit, but merely an appeal, and the only prayer which could properly be made by the appellant was, the reversal of the decision of the court below granting the faculty ; this SIR HERBERT JENNER FUST did, and he could not in that form of proceeding have admonished the churchwardens to remove the tables. I believe I take a correct view of what SIR HERBERT JENNER FUST did, and his reason for not doing more, because, having declared these matters to be illegal, I apprehend that, if the form of proceeding allow, no alternative is left to a judge but to cause that which is illegal to be removed ; it would be contrary to all sound reason for a judge to be called upon to pronounce his judicial opinion that things were contrary to law, and at the same time to leave them to continue in defiance of the law.

E An identical view was taken by SIR JOHN DODSON, who said :

F It has been said that the case of *Faulkner v. Litchfield & Stearn* (2) was distinguishable from the present, inasmuch as the court in that case, although it pronounced the stone altar to be illegal, did not order its removal. But that apparent difference is attributable altogether to the mode in which the case came before it. In that case a faculty had been granted, by the decree of an inferior court, confirming the erection of the stone altar. From that decree an appeal was brought to the Arches, and the learned judge reversed the decree appealed from. It was not competent, under the circumstances of the appeal, to go further ; but there can be no doubt that if the suit before him had been for the removal of the altar, he must have decreed it.

G Mr. Ashworth has kindly but firmly pressed on me the submission that the opinion expressed by Dr. Lushington, and concurred in by SIR JOHN DODSON in 1855, as to the procedure in force in the Ecclesiastical Courts in 1845 is more likely to be correct than is the view I had taken of the pleadings and order in *Faulkner v. Litchfield & Stearn* (2), and on this point I am not disposed to disagree with him. The matter is not perhaps of any great importance, as, even if the explanation given by Dr. Lushington and Sir John Dodson of the order made in *Faulkner v. Litchfield & Stearn* (2) be wrong, the fact that they were driven to seek an explanation, even a wrong one, as to why SIR HERBERT JENNER FUST had not directed the churchwardens to remove the stone altar

emphasises their view that, if he had had jurisdiction, he had no discretion in the matter, but was bound as a matter of law to direct the removal of the stone altar.

These observations were, however, strictly speaking, merely *obiter*, although entitled to the greatest possible weight. Further confirmation of the existence of the limited discretion is derived from the fact that in the earlier proceedings the then chancellor, and now the Dean of the Arches, refused to give an authority to remove the altars, and expressed the hope that they would remain in the church. For the reasons I have given, and further taking into account that both *Faulkner v. Litchfield & Stearn* (2) and *Liddell v. Westerton* (3) were directed to the only communion table in the church, and not to an altar subsidiary to the holy table in a side chapel, in my judgment, as regards the five tables, the chancellor not only has a discretion to refrain from issuing a faculty authorising the removal of all or any of the five altars, but also can, if, in the exercise of that discretion, he so decides, grant a faculty authorising their retention.

When the time comes for the chancellor to consider these matters, I do not wish to say anything that will fetter the exercise of his discretion in any way, and any party to these proceedings will be at liberty to advance any grounds or matters of fact calculated to influence the discretion of the chancellor one way or the other. Among the matters that he will be entitled to consider are, in my judgment, the following : the number of the subsidiary altars ; the fact that they were introduced into the church without a faculty ; practical considerations, such as whether they, or any of them, tend unduly to darken the church ; and æsthetic considerations, such as whether their retention tends to beautify it or the reverse. In the case of one of the altars, one should not lose sight of the fact that it is a memorial to a dead person. Another factor which the chancellor may consider is the unity of the parish, or, as Mr. Vaisey put it, the spiritual good of the parish as a whole, which is probably another way of stating the same thing. This list is not intended to be exhaustive, but to assist, and not to hamper, the chancellor in the exercise of a discretion which is his, and not mine. As a result of my decision on this point, the chancellor's order will require modification.

Before passing from the question of the altars, to avoid any possibility of future misconception, I would add that I have not considered, and no argument has been addressed to me on, the question whether the earlier cases of *Faulkner v. Litchfield & Stearn* (2) and *Liddell v. Westerton* (3) are no longer the law, so far as they decided that the holy table of a parochial church must be movable.

The next articles with which I must deal are two tabernacles or aumbries, one in a steel safe in the wall, at the back of what has been called the high altar, to which access is obtained through a door in a wooden structure which serves both as a support to the crucifix and as a cupboard, the other also in a safe in the wall, above and behind

the altar in the south chancel aisle, which has been called the Jesus altar. No grounds have been advanced which satisfy me that the decision of the chancellor on this point was anything but right, and I affirm his order authorising their removal.

- A I was pressed by Mr. Vaisey to give some judgment which would decide once and for all whether the practice of granting faculties for aumbries, where the sacrament was reserved, was right or wrong. To accept this invitation would, in my judgment, be going far beyond the functions of the appellate court. I am here to determine the law as applicable to the facts of this particular case, and nothing else.
- B Mr. Vaisey, on behalf of Mr. Roffe-Silvester, said with great frankness that Mr. Roffe-Silvester was accustomed to the practice of reservation, and—at any rate so long as he was in this parish—could not give it up. He urged, on the assumption, but without making any admission, that reservation is unlawful, that there was a dilemma in churches where
- C reservation was illegally practised, since either there was no receptacle in which the reserved sacrament could be kept decently in safety, or the incumbent was driven to provide such a receptacle in the church without faculty. He urged that the escape from this dilemma was for this court to pronounce that, wherever reservation was practised in
- D fact, the chancellor ought, in the interests of decency, to grant a faculty authorising a safe and seemly receptacle. It is no part of my duty to make any such pronouncement. In any event, in my judgment, the escape from the dilemma is for the priest to abandon an illegal practice, and not for the Consistory Court to aid and abet him in the illegality.
- E The observations I have just made relate to the submissions made on the facts of this case, and are not directed in any way to other cases where the sacrament is reserved with the approval of the bishop, and application is made to a Consistory Court for provision to be made for its proper and decent reception.
- F It was further suggested that two passages in the judgment of the chancellor relating to the two aumbries lent themselves to ambiguity, the one indicating that he had no discretion in the matter at all, and must in any event refuse every application for a receptacle for the reserved sacrament in a church, no matter what the circumstances might be,
- G the other indicating that he might, at some future date, entertain an application by the vicar for an aumbry differently situated from the two to be removed. I see no ambiguity whatever in the chancellor's judgment. He has made it clear that his judgment does not preclude the vicar at some future time from applying to him for a faculty authorising
- H an aumbry, and, while it will be open to any person interested to oppose that application, it cannot be on the ground that, by reason of the judgment given in this case, the matter is *res judicata*. Neither the chancellor nor this court has prejudged any such application, nor do I intend to express or indicate any view as to how such an application, if it is made, should be entertained.

As regards the order relating to the two sanctuary lights, I see no ground for disturbing it. The two lights are closely connected with the two aumbries, and they must share the same fate. The only modification I propose to make in the chancellor's order relating to the aumbries and lights is as follows. The order as it stands gives the vicar and the churchwardens one month from the date of the order to effect the removal of the aumbries and the lights. As regards the aumbry in or behind the high altar and the attendant lamp, this order will stand. As regards the other aumbry and its attendant lamp, I think it only right, in view of all the circumstances, that the vicar should have further time to consider his position, and, if so advised, make an application for an alternative place for reservation. Accordingly, in relation to the second aumbry and light, I extend the time within which the vicar has authority to act from one month to three months. A B

As regards the green and black crucifix, which at present stands immediately above the high altar, supported by the wooden structure which leads to the safe in which I understand the sacrament is at present reserved, the chancellor has authorised its removal, and I see no grounds for interfering with his decision. C

There is no finding by the chancellor that this crucifix has been, during the present incumbency, the object of superstitious regard, or that there is any danger of this happening. I cannot, however, shut my eyes to the facts that the removal of this crucifix was ordered in the earlier proceedings, and that, while it stands as it stands to-day—above the principal altar in the church—it may be a reminder of the illegalities and irregularities to which I have already referred. A crucifix is not intended to recall such things as these. In any event, as it is clear that the high altar itself will have to go, I suspend the operation of the order as to the crucifix until application is made to the chancellor in connection with that altar, so that the matter may not go through piecemeal. As I have already said, the aumbry and the light must be removed, or visibly and manifestly rendered incapable of being used for reservation. As the real objection to this crucifix is more to the circumstances in which it comes to be in the place where it now stands than to the crucifix itself, the order will be without prejudice to any application by any person interested—including, of course, the vicar—for a faculty to have the crucifix placed somewhere else in the church. E F G

The next article is a tablet placed upon a granite shrine of the Virgin Mary inscribed with the words :

Holy Mother of God, pray for us and for those who came to the aid of this church in 1933. H

After these words, as part of the inscription, follow the names of a number of parishes the priests whereof had assisted in the services of St. Hilary during the period when Mr. Walke was incapacitated by ill-health. Objection was taken to the inscription on two grounds: (i) that it was illegal, and (ii) that it commemorated, or was believed to

commemorate, the acts of illegality already described. As to the first point, I do not think that the chancellor attached any importance to it. Neither do I. On the second ground, while he accepted fully and absolutely, as I do, the evidence of the vicar that the memorial had nothing to do with the earlier proceedings, he thought that the mistaken
A belief that it did do so would or might remain. Accordingly, he authorised the removal of the offending words. In my judgment, the discretion of the chancellor was wisely and rightly exercised. As to the thurible, I hesitated for some time about the wisdom of extending the order to a thurible, a small metal chattel in no sense a fixture in the church. On
B this point, I feel the force of Mr. Vaisey's argument that the faculty jurisdiction was being used to restrain the vicar from the ceremonious use of incense. In any event, an order which authorises Miss King to remove the thurible and then directs her to hand it to the vicar is in some danger of being rendered nugatory either in the letter or in the
C spirit. On the whole, I have come to the conclusion that, inasmuch as a thurible is an article which in other cases this court has held to be within the faculty jurisdiction, the doubts I entertain ought not to prevail, and the order of the chancellor will stand.

Mr. Vaisey submitted that the confessional box had not been interfered
D with in the earlier proceedings, and that the matter was *res judicata*. The chancellor in the earlier proceedings did not decree a confirmatory faculty for the confessional box, nor did he authorise its removal. Accordingly, it remained in the church. This cannot constitute the matter *res judicata*. I am, however, absolved from the necessity of
E deciding whether the chancellor's order in this matter was right or wrong. Having heard stated in open court the vicar's views on confession and the use of the confessional box, Miss King, in that spirit of conciliation which I hope and believe is spreading, stated that, without giving up one iota of her principles, she was prepared not to press for
F the removal of the confessional box. She suggested, however, that in its present place it shut out a good deal of light, and that the interior of the church would be improved either by moving the confessional box to some other part of it or by cutting down its height, if it is to remain where it now is. The result will be that the order for the removal of
G the confessional box will be set aside. No confirmatory faculty will be granted at this stage, but the vicar, or any party hereto, when it has been decided whether to cut down the height or to remove the confessional box to another part of the church, can apply to the chancellor for a confirmatory faculty, and the matter will then rest in the chancellor's
H discretion. To make it clear, when I say that the vicar or any party hereto "can apply to the chancellor," I mean that he can apply in these proceedings without the necessity for issuing a fresh petition. On the other hand, if the confessional box is neither taken to another part of the church nor shortened, Miss King can apply to the chancellor for a faculty authorising its removal, and this application will not be pre-

judiced in any shape or form, either in fact or in law, by the concession, the scope of which I have endeavoured to indicate.

As regards three other articles—a blue votive lamp hanging before an image of the Virgin Mary, two wrought iron votive candlesticks, and a sanctus bell—the appeal was not pressed as regards these, and the order of the chancellor will stand. The faculty authorised the removal of the words “Mary, Help” from the stone base of a crucifix which the chancellor permitted to remain. This is a very small matter, and one essentially in the discretion of the chancellor. I shall not disturb his order. A

As regards costs, the chancellor in the court below ordered that each party should bear its own costs, and, in any case, as the matter was peculiarly within the discretion of the chancellor, the order as to costs will stand. B

It has been suggested, and has been accepted by both sides, that the authority at present addressed to the vicar and churchwardens should be altered to an authority to the vicar and the churchwarden, the second respondent to the suit. I assent to this. The further modifications to the order can be agreed by counsel, with general liberty to apply to me in chambers. I think I have now dealt with every item the subject-matter of this appeal, except the costs of this appeal, and on that matter I wish to hear counsel before coming to a decision. I hope I shall not be exceeding my functions if I add one word more. The order from which this appeal is brought is dated Aug. 30, 1938. The hearing of this appeal began on Oct. 10, 1938. Between those two dates, the inhabitants of this parish, in common with their fellow countrymen, have passed through a period when our land was menaced with a danger as great as any which a civilised state has been called on to face. The entire community was united in a common anxiety amounting almost to despair, knowing that a world war would establish the spiritual bankruptcy of this generation. I cannot believe that, with this warning fresh in their minds, the people who live side by side, and will continue to live side by side, in the parish of St. Hilary, will fail in their urgent duty to bring, by their individual effort and example, that peace which has been so long absent from this parish, and which it so sorely needs. I have deliberately extended the time prescribed in this order for certain things to be done, so that the festival of Christmas, with its familiar message, may provide an opportunity to make a reality out of an aspiration. So far as it is competent for a court of law to determine these matters, I have endeavoured to determine them. The main task lies elsewhere. No two persons can think exactly alike. It is not true that, because two persons hold diametrically opposite views about the same thing, one of them must inevitably be wrong. Truth is many-sided, and it may well be that each is seeing the same truth, but from a different angle. C D E F G H

Solicitors: *Evill & Coleman* (for the appellants); *A. J. Adams & Adams*, agents for *Coulter Hancock & Co.*, Truro (for the respondent).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

HARRIS v. JAMES HOWDEN & CO. (LAND), LTD.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
October 26, 1938.]

A *Workmen's Compensation—Claim—Time for—Widow of workman pursuing other remedy—Failure through misjoinder of parties—Further proceedings barred by lapse of time—Reasonable cause—Workmen's Compensation Act, 1925 (c. 84), s. 14.*

The husband of the plaintiff had been killed in an accident due to the condition of the floor of a power station. The case in support of an action for damages was so strong that it was not then thought advisable to make a claim under the Workmen's Compensation Act, 1925, which there was little likelihood of ever being prosecuted. In the course of the action for damages, great difficulty was encountered in ascertaining who, among a number of contractors and sub-contractors, was responsible for the condition of the floor which was the cause of the accident. At the trial, it was decided that the wrong parties had been sued, and it was then too late to bring an action under the Fatal Accidents Act against the right party. Upon the action being dismissed, application was made for an assessment of compensation under the Workmen's Compensation Act, 1925. It was contended that the absence of the claim under the Act was due to mistake within the meaning of sect. 14 of that Act:—

D **HELD:** the making of a claim is not a mere formality. The requirements of the Act in that respect must be fulfilled, in the interests of both parties. Upon the facts, the widow deliberately refrained from making a claim under the Act because she deemed it in her interest to take other proceedings. The application for compensation was, therefore, refused.

E **[EDITORIAL NOTE.]** Although there have been a considerable number of decisions upon the question of reasonable cause for failure to make a claim for workmen's compensation, it would not appear that the particular circumstances of this case have ever before been considered by the courts. At the same time, it cannot be said to be unusual in these days that construction and repair work should be parcelled out amongst a large number of contractors and sub-contractors, and therefore the decision herein must be carefully considered by those whose duty it is to advise in such cases. The great number of contractors and sub-contractors made it extremely difficult to discover the one against whom the action can be successfully brought. It is important to note that, however clear may be the negligence of some party, the action against that party, especially where the negligence has resulted in the death of the workman, may, after the lapse of only one year, be completely met by a plea that it is out of time. It therefore becomes necessary in all cases to make a claim under the Workmen's Compensation Act.

G even although, at the time the claim is made, it is thought that there is little or no likelihood of that claim being prosecuted.

AS TO CLAIM FOR COMPENSATION, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 180-182, paras. 385-390; and FOR CASES, see DIGEST, Vol. 34, pp. 367-375, Nos. 2971-3038. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 389-413.]

H Case referred to:

- (1) *Lingley v. Firth (Thomas) & Sons*, [1921] 1 K.B. 655; 34 Digest 374, 3035; 90 L.J.K.B. 290; 124 L.T. 442; 13 B.W.C.C. 367.

APPLICATION for the assessment of workmen's compensation upon the dismissal of an action for damages brought under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934.

The plaintiff was the widow of a workman employed upon the construction of the Fulham power station. One of the upper floors, at the time of the accident to the deceased, consisted of steel gratings supported upon the girders of the structural work. Owing to one of these gratings being insecurely fixed, the deceased fell through the floor to the floor below and was fatally injured. The work had been given out to a very large number of subcontractors, and, although, after extensive inquiries, the contractors, Messrs. Dorman Long & Co., Ltd., and two subcontractors were joined in the action, it was found, after all the evidence had been heard, that the particular subcontractor to whose negligence the accident was due was not joined. The action therefore resulted in judgment for all the defendants. Thereupon the present application was made for the assessment of compensation under the Workmen's Compensation Act, 1925, s. 29.

C. S. Rewcastle, K.C., and *Geoffrey C. Hutchinson* for the plaintiff.

F. A. Sellers, K.C., and *R. M. H. Everett* for the defendants, the employers of the workman.

GODDARD, L.J. : After I had given judgment for the defendants in this case, Mr. Rewcastle applied to me to award to the plaintiff against the defendants James Howden & Co. compensation under the Workmen's Compensation Act, 1925, s. 29. He asked, however, for an adjournment to consider whether there should be an appeal against my judgment, and this I granted. On the further hearing, I was told that no appeal would be taken, and accordingly I promised to hear the application for compensation. The answer of the employers was that, as no claim had been made within six months of the accident, it was barred under sect. 14 of the Act. That no claim was made or action brought against the employers within the statutory period is common ground, and, therefore, I have to consider whether the failure to make the claim was caused by mistake or other reasonable cause. The plaintiff's solicitor was called, and told me of the inquiries he had made to ascertain the persons who were responsible for the condition of the floor, but it is not suggested that he was given inaccurate information, or any information which was misleading. Nor was any information that he sought refused him. So far as his evidence went, he made no inquiries of the man's employers, I assume for the very good reason that he never intended to sue them. They were not in fact joined until a fairly late stage in the case, and then only for the purpose of setting up a case under the Factory Acts, which I can only describe as a forlorn hope. Mr. Rewcastle has argued, first, that the failure to make the claim was due to a mistake. He says that against someone there was a clear case of *res ipsa loquitur*, and that the action failed only because the wrong person was sued by mistake. However, that is not, in my judgment, the sort of mistake that is referred to in the section. It must, I think, be a mistake relating to the claim against the employers. Here there was nothing of the kind.

- The plaintiff, acting on advice, deliberately refrained from claiming compensation, because it was conceived that she had a good—and, indeed, unanswerable—claim under the Fatal Accidents Act, as I think she probably had if she could have got the right defendant. Then was there reasonable cause for failing to make the claim? No doubt this is
- A a question of fact, provided that there is evidence on which I could find that there is something which in law would constitute reasonable cause. It is said that it was reasonable not to give notice of a claim, because it seemed so clear that the widow had a claim under the Fatal Accidents Act that it would have been verging on the absurd to give
- B notice of a claim which no one thought would ever be prosecuted. It is well-established by numerous decisions—and in particular by *Lingley v. Firth (Thomas) & Sons* (1)—that the making of a claim is not a mere formality, but the requirements of the Act in that respect must be fulfilled in the interests of both parties. If, then, the widow deliberately
- C refrains from making a claim under the Act because it seems to be in her interest to take other proceedings, I cannot see that I can hold, when those proceedings have failed, that this constituted reasonable cause so as to enable her to resile, so to speak, from the position she chose to take up, and so as to enable her to bring proceedings for compensation. It
- D is only fair to Dorman Long & Co., Ltd., to say that in their defence they raised quite clearly the plea that they were not in charge of, nor responsible for, the floor at the time of the accident. If a person brings an action to which an appearance is entered and a defence put in, it cannot be assumed that in fact there is no defence to the action. Everyone who
- E brings such an action as this must know that they are liable to be defeated on one ground or another. Had a claim been made for compensation, the plaintiff need not have presented it until she had disposed of the action. On the other hand, had the employer demanded an arbitration, the hearing would no doubt have been adjourned until the action was tried.
- F I deeply regret the position which results. The result, disastrous in the extreme, is brought about, first, by the difficulty the plaintiff's adviser had in investigating a position due to the multiplicity of contractors engaged on this work, and then by the period of limitation fixed by the Fatal Accidents Act and by the Workmen's Compensation Act.
- G However, I have no dispensing power over the provisions of an Act of Parliament, and I cannot allow my sympathies for a much injured woman to cause me to find that there was reasonable cause for abstaining from making a claim without evidence of something which would, in my opinion, amount in law to such a cause.
- H I have only to add that I have considered numerous cases on the failure of plaintiffs to give notice or to make a claim and have been unable to find, nor have counsel been able to direct my attention to, any which is an authority on the particular facts of this case. The trend of authority indeed is, I think, that, where the reason for a workman or his dependants refraining from making a claim is a consideration

of his or their own interests, and is in no way widened by his employers' knowledge or conduct, that is not enough to constitute reasonable cause for not complying with the provisions of the Act. I must, therefore, dismiss this application.

Solicitors: *Evill & Coleman* (for the plaintiff); *Carpenters* (for the defendants, the employers of the workman).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

LOCKETT v. A. & M. CHARLES, LTD.

[KING'S BENCH DIVISION (Tucker, J.), October 14, 1938.]

Sale of Goods—Implied warranty—Fitness for human consumption—Husband and wife lunching in hotel—When wife entitled to sue in contract.

The plaintiffs, husband and wife, in the course of a motor journey stopped at a hotel for lunch. Owing to the nature of the food supplied, the wife was taken ill with food-poisoning. Upon the question of ordering the meal, the evidence was completely neutral, being that a man and a woman sat at a table and ordered their food. It was agreed that the husband paid for the meal:—

HELD: there being no evidence that either the husband or the wife was in charge of the proceedings, each of them was, as between them and the proprietor, liable to pay for the food ordered, whatever might be the arrangement between them. On the facts, there was an implied contract between the wife and the proprietor, and she was entitled to recover damages for breach of the implied warranty that the food supplied was fit for human consumption.

[EDITORIAL NOTE.] In a recent case, the question here decided was incidentally considered, and it was made the subject of a *dictum* by HILBERY, J. It would seem that the precise legal implication to be drawn when a husband and wife enter a restaurant and a meal is ordered must depend upon the particular circumstances of each case. There is, however, a *prima facie* presumption that each party is contracting separately with the proprietor, and, if there be no precise evidence as to who ordered the food, either party will be in a position to bring an action for breach of the implied warranty. It should be noted that in the present case the action was also framed in tort, but during the course of the case counsel abandoned this cause of action and chose to rely solely upon the breach of the implied warranty.

AS TO IMPLIED FITNESS FOR HUMAN CONSUMPTION, see HALSBURY, *Hailsham Edn.*, Vol. 29, pp. 63-66, para. 73; and FOR CASES, see DIGEST, Vol. 39, p. 442, Nos. 710-715.]

Case referred to:

- (1) *Regensteiner v. Camuto's Restaurant, Ltd.* (Hales and Piper, Third Parties) (1938), *Times Newsp.*, May 6.

ACTION for damages for breach of contract and/or breach of duty. On Mar. 9, 1937, the plaintiffs, who were husband and wife, were on their way to Gloucestershire, when they stopped for lunch at a hotel at Bray owned by the defendant company. The circumstances of the ordering of the meal are fully dealt with in the judgment. The meal included whitebait, and the female defendant, having swallowed a mouthful of the whitebait, refused to eat the remainder. She was subsequently

taken ill, and it was contended that the illness was due to the fact that the food supplied was unfit for human consumption, and that there was a breach of an implied term of the contract under which the meal was supplied. There was also a claim in tort, but the case was ultimately rested on a breach of warranty alone.

- A J. W. Morris, K.C., and B. B. Stenham for the plaintiffs.
N. R. Fox-Andrews for the defendant company.
W. A. Fearnley Whittingstall for the third parties.
B. H. Waddy for the fourth party.

- B TUCKER, J.: I am satisfied from the evidence that the plaintiffs have discharged the onus of proving that the admitted food-poisoning from which the female plaintiff suffered was due to the whitebait which she had consumed. The next question is whether, that being so, she is entitled to recover any damages for her general pain and suffering, or
C whether the only damages which can be recovered are the special damages incurred on her behalf by the male plaintiff, which special damages have been agreed at £99 8s.

- With regard to the female plaintiff's position in respect of breach of warranty, every proprietor of a restaurant is under a duty to take
D reasonable care to see that the food which he supplies to his guests is fit for human consumption. If he does not take such reasonable steps, and if he is negligent, a person who buys the food which he supplies can recover damages from him based on his negligence. As, however, there is no allegation of such negligence in this case, it must be assumed that
E the proprietor of the hotel and his servants could not be at fault in any way, and either plaintiff can recover only if he or she establishes that there was a contract between him or her and the proprietor of the hotel.

- Counsel for the defendants submitted that, where a man and a woman, be they husband and wife or not, go into a restaurant and the man
F orders the dinner, *prima facie* the only inference is that the man alone makes himself liable in contract to the proprietor of the hotel. He agreed that every case must depend on its own circumstances, and that there might very easily be circumstances in which that inference could not be drawn, and that there might be a case where it was quite apparent
G that the woman was going to pay, and that in fact, to use counsel's expression, she was in charge of the proceedings. Counsel also agreed that, where somebody orders a private room at a hotel, entertains a large party, and makes arrangements beforehand, there is no question but that he is the only person who is contracting with the hotel, and that his
H guests who attend have no contractual relationship with the proprietor of the hotel. Counsel, however, argues that, in the ordinary case where a man and a woman go into a hotel, it is naturally assumed that the man is going to pay for the meal, and that he is the one making the contract, unless there is evidence to the contrary.

In this particular case, there is very little evidence to show precisely

what happened in the hotel in that respect. The man and woman who went there happened to be husband and wife, but on the evidence there was nothing to indicate that fact to the waiters or to those in charge of the restaurant, and the position must have been exactly the same as that which it would have been if they had not in fact been husband and wife. It was simply a case where a man and a woman went into the hotel to have lunch. There is no evidence to show that either was, to use counsel's expression, more "in charge of the proceedings" than was the other. It can only be assumed that the normal procedure was followed and that the man asked the woman what she was going to have and that she chose her food accordingly. The evidence is that both plaintiffs ordered, or had, whitebait. However that may be, there is no particular evidence to show that anything unusual happened on this occasion. It is what may be described as completely neutral evidence, and simply a case where a man and a woman sat down at a table and ordered their food, and I think that I am entitled to assume that the man asked the woman what she would have, and that she accordingly ordered her meal. There was no specific evidence as to who actually paid for the lunch, but everybody is agreed in fact that the husband did.

Counsel for the plaintiffs is, in my opinion, right when he submits that, when persons go into a restaurant and order food, they are making a contract of sale in exactly the same way as they are making a contract of sale when they go into a shop and order any other goods. I think that the inference is that the person who orders the food in a hotel or restaurant *prima facie* makes himself or herself liable to pay for it, and when two people—whether or not they happen to be husband and wife—go into a hotel and each orders and is supplied with food, then, as between those persons and the proprietor of the hotel, each of them is making himself liable for the food which he orders, whatever may be the arrangement between the two persons who are eating at the hotel. On the facts in this case, it is, in my opinion, right to hold that there was a contract implied by the conduct of the parties between the plaintiff, Mrs. Lockett, and the defendants when she ordered and was supplied with the whitebait at the Hotel de Paris.

This matter was discussed in *Regensteiner v. Canuto's Restaurant, Ltd. (Hales and Piper, Third Parties)* (1), in which it appears that HILBERY, J., although not finding it necessary to make the matter actually the basis of his decision (because he held that it was not open to a third party to raise the point, since it had not been raised by the actual defendant in that case), none the less expressed the view that, on the facts of the case before him (it was a case of husband and wife), there being no special or unusual circumstances, the wife was entitled to recover in contract. I respectfully concur in the view which he expressed that each case depended on its own circumstances. However, where there is no evidence to indicate to the proprietor of the hotel what the relationship between the parties is, and where there is no evidence that one or the

other is in charge of the proceedings, and yet one or the other takes on himself the position of a host entertaining his guests, the proper inference of law is that the person who orders and consumes the food is liable to pay for it as between himself and the proprietor of the restaurant. If that is so, it follows beyond all doubt that there is an implied warranty
A that the food supplied is reasonably fit for human consumption. I hold that the whitebait delivered in this case were not reasonably fit for human consumption, and that there was a breach of warranty. Accordingly I give judgment for the male plaintiff for the agreed sum of £99 8s., and for Mrs. Lockett for £100.

B Solicitors: *Hugh-Jones & Flinn* (for the plaintiffs); *Joynson-Hicks & Co.* (for the defendant company); *William Easton & Sons* (for the third parties); *J. A. & H. E. Farnfield* (for the fourth party).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

BURNS v. BURNS.

D [PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Roche and Sir Lyman Poore Duff), **July 18, October 17, 1938.**]

E *Privy Council—British Columbia—Distribution of intestate's estate—Right of widow—Wife leaving husband and living in adultery at the time of his death—Onus of proof—Alberta Intestate Succession Act, 1928 (c. 17), s. 19 (1).*

F The appellant was granted letters of administration of the estate of his brother Dominic Burns, who died in 1933, intestate and without issue, and domiciled in British Columbia. James Francis Burns, a nephew of the deceased Dominic Burns and the husband of the respondent, thereupon became entitled to a share of the estate. He died domiciled in Alberta in 1935, intestate and without issue, and the respondent was appointed administratrix of his estate, the letters of administration being resealed in British Columbia. The appellant instituted proceedings for a revocation of the resealing of the grant, basing his claim for revocation on the grounds (i) that, when the respondent and James Francis Burns went through a form of marriage in 1923, she was the lawful wife of a man then living, and alternatively (ii) that, at the time of the death of James Francis Burns, the respondent had left him, and was then living in adultery, and therefore was not entitled to take any part of her husband's estate, by reason of the provisions of the Alberta Intestate Succession Act, 1928:—

G **HELD:** (i) the first ground raised only a question of fact, upon which there were concurrent findings by the two courts below, and which the court saw no reason for reconsidering.

H (ii) in order to establish the statutory forfeiture under the Alberta Intestate Succession Act, 1928, s. 19 (1), the appellant must prove that the wife was living in adultery at the time of the husband's death or give evidence from which the court could draw an inference to that effect. It was not sufficient to prove adultery prior to the husband's death, and the proof of such adultery did not shift the burden of proof and make it necessary for the wife to prove that such adultery had ceased prior to the date of the husband's death.

[EDITORIAL NOTE.] The main contention in this case was that the burden of proof was shifted and placed upon the wife once it was established that she had left her husband and gone to live in adultery. The court, however, did not accept this view, and decided that it was necessary for the party attempting to establish the statutory forfeiture to show either that the adultery continued in fact, or, from the facts proved, that there was a presumption that it did so continue.

AS TO RIGHTS OF WIDOW UPON INTESTACY, see HALSBURY, Hailsham Edn., A Vol. 10, pp. 578-582, paras. 833-840; and FOR CASES, see DIGEST, Vol. 18, pp. 20-24, Nos. 189-221.]

APPEAL from a judgment of the Court of Appeal for British Columbia (MARTIN, C.J., McPHILLIPS and SLOAN, JJ.A.), dated Jan. 11, 1938, dismissing an appeal from a judgment of the Supreme Court of British B Columbia (ROBERTSON, J.), dated May 26, 1937.

Cyril Radcliffe, K.C., and *G. P. Slade* for the appellant.

W. B. Farris, K.C., for the respondent, was not called upon.

The judgment of their Lordships was delivered by LORD THANKERTON.

LORD THANKERTON: The appellant, who is plaintiff in the action as administrator of the estate of Dominic Burns, deceased, and in his own right, appeals from a judgment of the Court of Appeal for British Columbia dated Jan. 11, 1938, affirming the judgment of ROBERTSON, J., dated May 26, 1937, which dismissed the appellant's action against the D respondent as administratrix of the estate of James Francis Burns, deceased, and in her own right, in which the appellant sought revocation of the grant, whereby letters of administration of the estate of James Francis Burns issued out of the district court of the district of Southern Alberta were resealed in the province of British Columbia on Sept. 22, E 1936, and sought a grant of administration of the estate of James Francis Burns to the appellant, an uncle of the deceased, as his next of kin. Dominic Burns, a brother of the appellant and an uncle of James Francis Burns, died on June 19, 1933, intestate and without issue, and domiciled in British Columbia. James Francis Burns then became entitled to a F share of the estate as one of the next of kin. The appellant was granted letters of administration of the estate of Dominic Burns on July 19, 1934. James Francis Burns, being then domiciled in the province of Alberta, died at Calgary on Dec. 31, 1935, intestate and without leaving issue. The respondent, as his widow, was appointed administratrix of his estate G by letters of administration issued out of the district court of the district of Southern Alberta on Apr. 25, 1936, which were resealed in British Columbia on Sept. 22, 1936. Thereafter, the respondent instituted proceedings, as lawful widow and administratrix of her husband's estate, for an account from the appellant of his administration of the estate of H Dominic Burns, which was of considerable amount, and these proceedings were held over to enable the appellant to bring the present action.

The appellant based his claim for revocation of the resealing of the letters of administration granted to the respondent on two separate and alternative grounds—namely, (i) that, at the time when the respondent

and James Francis Burns, on Mar. 22, 1923, went through a form of marriage at Vancouver, the respondent was the lawful wife of one Melvin Stuart Huggins, who is still living, and that, accordingly, the respondent is not the lawful widow of James Francis Burns, and (ii) that, at the time of the death of James Francis Burns, the respondent had left him, and was then living in adultery, and that she was not entitled to take any part of her husband's estate, by reason of the provisions of the Alberta Intestate Succession Act, 1928, s. 19 (1), which is in identical terms with the Administration Act, British Columbia, 1924, s. 127 (1), as amended, and provides as follows :

If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate.

The first ground of the appellant raises a question of fact as to the alleged marriage of the respondent to Huggins, and the courts below have concurrently found against the appellant, having accepted the evidence of the respondent, despite her cross-examination, on which the appellant relied, no independent evidence of any such marriage having been submitted by the appellant. Their Lordships see no reason for reconsidering the concurrent findings of the courts below. The appellant, as regards his second ground, raised two questions of construction of the statute, and a question of burden of proof. The findings of the trial judge on this branch of the case are as follow :

Now the facts in this case are that prior to her marriage to Burns the defendant had lived in adultery with Huggins up to about 1919. There is nothing to show what her actions were between that date and 1923, when she married Burns, with whom she lived for about three years, and then separated. It is shown that she had a child in 1931. It is also shown that she went into a mental hospital in 1934 and continued there until 1935 and that she was suffering from neuro-syphilis. There is nothing to show when she became infected with the disease mentioned or by whom she was infected ; in fact it might have been hereditary. There is nothing to show any improper conduct on her part since she left the hospital.

The appellant maintained, in the first place, that, if the wife had left the husband, and had lived in adultery prior to the husband's death, the statute would apply, even though she was not living in adultery at the time of his death. Their Lordships find it difficult to take this contention seriously, and their Lordships agree with the trial judge that "the statute means exactly what it says, and that it means a state of affairs existing at the death of the husband."

The appellant next maintained that, if it were established that the wife had left the husband and had been living in adultery prior to the husband's death, the burden of proof was shifted, and it would be for the wife to prove that the adulterous life had not existed at the time of the husband's death. Their Lordships are of opinion that this contention is equally untenable. It is for the appellant to prove the facts necessary to establish the statutory forfeiture. As the trial judge states, there must be evidence from which the court can draw the inference that the wife was living in adultery at the time of her husband's death. If, for instance, association with a man other than the husband was proved to have been adulterous

during a period prior to the death, and the association was proved to have been continuing towards the time of the husband's death, the court might find itself in a position to infer that the adulterous nature of the association still continued, but the appellant's contention necessarily goes far beyond this, as the facts of the present case admittedly afford no material for any such inference, since no such association is suggested to have been proved to exist at the time of the husband's death, or for a material period prior thereto. A

The appellant having thus failed in his first two contentions as regards the statutory forfeiture, he has failed to establish that the respondent was "living in adultery at the time of her husband's death," and the forfeiture cannot apply. It therefore becomes unnecessary to consider the appellant's third contention, which relates to the construction of the words "has left her husband" in the section, and their Lordships express no opinion on this matter. The appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs, and that the judgment of the Court of Appeal of British Columbia should be affirmed. B

Appeal dismissed with costs.

Solicitors: *Blake & Redden* (for the appellant); *Gard, Lyell & Co.* (for the respondent). C

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.] D

Re BOARD OF CONTROL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **June 1, July 20, 1938.**] E

Divorce—Incurable unsoundness of mind—Board of Control file—Disclosure—Admission of copies—Matrimonial Causes Rules, r. 25 (1) (c).

The Board of Control file will be disclosed to both parties to a petition founded on incurable unsoundness of mind before the hearing, subject to considerations of the public interest in any particular case. F

[EDITORIAL NOTE.] The only question in dispute in this connection was whether the documents ought to be disclosed before the hearing of the petition. The matter has not proceeded to a strict judicial decision, the authorities stating that disclosure would be made to any *bona fide* applicant.

AS TO DIVORCE FOR INSANITY, see HALSBURY, Supp., Divorce, para. 981.] G

DIVORCE MOTION. On June 1, 1938, the Official Solicitor, who appeared as guardian *ad litem* of a respondent to a divorce petition who it was alleged was incurably of unsound mind, moved that the Commissioners of the Board of Control should supply to him, before trial, copies of all documents in the Board's possession relating to the respondent's medical history. The application was stated to be a test matter. H

Theodore Turner for the Official Solicitor.

The Attorney-General (Sir Donald Somervell, K.C.), and *Valentine Holmes* for the Board of Control.

The Attorney-General: The court has no jurisdiction to make the order for which the Official Solicitor prays. If, however, your Lordship states that disclosure before trial of documents and records in the Board's possession will in proper cases be of assistance to the court, such a statement will weigh heavily with the commissioners when considering
 A any such application.

SIR BOYD MERRIMAN, P.: Subject to considerations of public interest in particular cases, disclosure to both parties (and there can be no distinction between the Official Solicitor and any other properly constituted guardian *ad litem*) of such documents must unquestionably be
 B in the interests of justice, and should be made.

Solicitors: *Official Solicitor*; *Solicitor, Ministry of Health* (for the Board of Control).

C [Reported by J. F. COMPTON MILLER, Esq., *Barrister-at-Law*.]

NOTE.—On July 20, 1938, in a suit of similar character, SIR BOYD MERRIMAN, P., stated that, in cases where it was necessary or desirable to have the Board of Control file, he wished to make it clear that he was prepared, without making an order in every particular case, under the Matrimonial Causes Rules, r. 25 (1) (c), to admit copies of the file. The copies were clearly admissible under the rule. If an order to that effect had to be made, he was prepared to make such an order.
 D

BRITISH THOMSON-HOUSTON CO., LTD. v. TUNGSTALITE, LTD.

E [CHANCERY DIVISION (Simonds, J.), **October 18, 1938.**]

Patents—Infringement action—Interlocutory application—Tests and experiments—Experiments to be limited to issues of infringement and validity—Statements of contentions of parties—Form of such statements—R.S.C., Ord. 53A, r. 21A (2) (b), (d).

In an action for damages for the infringement of letters patent, the plaintiffs made an application that, instead of directions under R.S.C., Ord. 53A, r. 21A (2) (d) being given in the customary form, they should either deliver to the defendants a list of experiments on which they intended to rely upon the issue of infringement or else give notice that they did not intend to rely upon any such experiments; and that similarly the defendants should either deliver to the plaintiffs a list of experiments on which they intended to rely upon the issue of validity or else give notice that they did not intend to rely on any such experiments. It was also contended that the statement of the contentions of fact and of law should be curtailed:—
 F
 G

HELD: (i) this was a form of order which might well lead to the saving of expense, and one that might properly be made.

(ii) having regard to the wide character of the claim, the form of order settled in *Fraser v. Simpsons (Piccadilly), Ltd., and Platinum Products, Ltd.* (1) should not be departed from.
 H

[EDITORIAL NOTE. There has for some time been a feeling that patent actions might be considerably curtailed by appropriate interlocutory orders, thus keeping the costs of such actions within lower limits. The orders made in the present case both as to the tests and experiments to be made and as to the statements of contentions, are in each case designed to effect the saving of expense.]

AS TO INTERLOCUTORY PROCEEDINGS IN PATENT ACTIONS, see HALSBURY, Hailsham Edn., Vol. 24, pp. 679-685, paras. 1277-1282; and FOR CASES, see DIGEST, Supp., Patents, Nos. 2944a-2944i. See also YEARLY SUPREME COURT PRACTICE, 1938, pp. 1027, 1028.]

Case referred to :

- (1) *Fraser v. Simpsons (Piccadilly), Ltd., and Platinum Products, Ltd.* (1937), 54 A
R.P.C. 199; Digest Supp.

SUMMONS for directions under R.S.C., Ord. 53A, r. 21A, in respect of experiments and the statements of contentions of the parties.

W. Trevor Watson, K.C., and *G. S. W. Marlow* for the applicants. B

K. E. Shelley, K.C., and *G. Aldous* for the respondents.

SIMONDS, J. : This action is an ordinary patent action. The summons was issued under R.S.C., Ord. 53A, r. 21A, which gives somewhat unusual powers with regard to the procedure in patent actions. There are really two quite distinct points upon which I have to give directions. The first is in regard to experiments. R.S.C., Ord. 53A, r. 21A (2) (d), provides simply : C

Upon any such application the court or judge may give such directions . . . (d) for the making of experiments, tests, inspections or reports [as the court thinks necessary]. D

Under that rule there has been adopted in the past a form which the defendants contend should be followed in this action. It is as follows :

Except by leave of the judge at the trial no drawings or models shall be put in evidence at the trial or evidence given of any experiment unless the party seeking to rely thereon shall have given notice thereof to the other party within four weeks from the date hereof and shall have offered to that party and his legal and technical advisers an opportunity of inspecting the said drawings and models and seeing the experiments or a repetition thereof performed. E

Then the corollary of that :

. . . no evidence shall be given at the trial relating to any drawing or model or experiment made in answer to any drawings models or experiments of the other party unless the party seeking to rely thereon shall have given notice thereof to the other party within seven weeks from the date hereof and shall have offered to that party and his legal and technical advisers an opportunity of inspecting any such drawings or models and seeing any such experiments or a repetition thereof performed. F

That is the form of directions which the defendants desire to be followed in this case, but the plaintiffs have proposed a somewhat new form, with a view, as I have no doubt, to saving the expense of experiments which they think may be rendered unnecessary if this procedure is followed. What they suggest is that within so many days G

. . . after the date of this order the plaintiffs shall either deliver to the defendants a list of the plaintiffs' experiments made for the purposes of this action upon which they propose to rely upon the issue of infringement [the point is that it is confined to infringement] or shall give notice to the defendants in writing that they do not propose to rely upon any such experiments upon such issue. H

Then similarly within so many days (presumably the same number of days)

. . . after the date of this order the defendants shall deliver to the plaintiffs a list

of the defendants' experiments made for the purpose of this action upon which they propose to rely upon the issue of validity of the letters patent sued on or shall give notice to the plaintiffs in writing that they do not propose to rely upon any such experiments upon such issue.

Then the form of order goes on to provide for answering experiments. That is a suggestion which I think it is worth while trying in this case.

- A It has not been suggested, and could not be suggested, in my view, that it can lead to any greater expense than can the form which has hitherto been adopted, and Mr. Shelley did not suggest that it would cause any greater expense. Though I conceive that it may entail some little delay, I do not think that it will entail so much delay as to be material. It
- B seems to me that there is substance in the suggestion that the plaintiffs and the defendants respectively should, in the first place, confine their experiments, one to the issue of infringement, and the other to the issue of the validity, of this patent. Accordingly, I propose in this case to make the order in that regard in the form in which it is proposed by
- C the plaintiffs. I am conscious, in making the order, that I am myself making something of an experiment, but at least it is an experiment which will, I think, result in no harm to anybody, and it may, as I conceive it, result in a substantial saving of expense.

- The second point is this. The rules to which I have referred provide,
- D by subrule (2) (b), that the judge may give directions for the delivery of statements signed by counsel setting out all the contentions, whether of fact or of law, including contentions as to the construction of the specification or other documents upon which the parties respectively intend to rely. That is something quite new in the procedure of actions in this
- E court. It is a rule which has been adopted in certain cases to which my attention has been called, and in *Fraser v. Simpsons (Piccadilly), Ltd., and Platinum Products, Ltd.* (1) the form of order was, after much discussion, elaborated by CLAUSON, L.J., as he now is. I accept the view which has been put forward by Mr. Trevor Watson on behalf of the
- F plaintiffs, which indeed finds support by what was said by FARWELL, J., not long ago in this court—namely, that that elaborate form of order is not one to be followed in every case. In every case one must judge, upon such material as is available, whether in the long run it is likely to save time and money to have such a statement signed by counsel. In
- G this case, upon the material before me, and forming the best opinion I can, I think that, on the whole, it is a case in which expense and time might be saved by such a written statement. One consideration that has influenced me in coming to that conclusion is the wide character of the claim to which reference has already been made by ROMER, L.J., in
- H the case in which this patent was under consideration. I think that time and money may well be saved if the plaintiffs are compelled to state with far greater particularity, and in the form in which the rule provides, what really is their claim, and how they say the defendants have infringed it. It may be that some slightly less elaborate form than that which was settled by CLAUSON, L.J., may be suitable in this case, but I am

inclined to adhere to the form which, after so much consideration, he settled, and accordingly I shall make a direction in accordance with the defendants' red-ink amendment to the summons—for written statements signed by one side and the other.

Solicitors: *Bristows, Cooke & Carpmael* (for the applicants); *Aird, Hood & Co.* (for the respondents). A

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

TIMINS v. TIMINS (BY HER GUARDIAN).

B

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
May 24, 1938.]

Divorce—Incurable unsoundness of mind—Guardian ad litem—Official Solicitor as guardian ad litem—Duties of Official Solicitor—Costs.

Upon a petition by a husband for divorce on the ground of the wife's incurable unsoundness of mind, the guardian *ad litem*, in the present case the Official Solicitor, had taken steps to ascertain (i) whether the respondent's illness had been caused by the petitioner, (ii) whether the petitioner's conduct was such that a cross-petition might be filed, or that the petitioner ought to file a discretion statement, (iii) the medical history of the respondent, (iv) the petitioner's means, and (v) an independent medical report on the respondent's mental condition:— C

HELD: These inquiries were properly made, and the petitioner was ordered to pay the costs of the Official Solicitor. D

EDITORIAL NOTE. The decision in this case sanctions a line of procedure adopted by the Official Solicitor where he was appointed guardian *ad litem* for the respondent to a petition founded on incurable unsoundness of mind. The line of procedure is intended to secure proper investigation of the case, having regard to the incapacity of the respondent. On a later day it was intimated by the court that the guardian *ad litem*, even though appearing in person, should always be present in court during the hearing of the petition. E

AS TO DIVORCE ON THE GROUND OF INSANITY, see HALSBURY, Supp., Divorce, para. 981.] F

PETITION FOR DISSOLUTION OF MARRIAGE under the Matrimonial Causes Act, 1937, s. 2 (*d*), on the ground of incurable unsoundness of mind. In this, the first petition under the above para. (*d*), the patient had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition within the meaning of sect. 3 of the Act. The petitioner was married to the respondent in 1896. Progressively from soon after the marriage, the wife suffered from attacks of depression, alternating with excitability, being first certified as of unsound mind in 1917, and she had been under care and treatment ever since. On behalf of the Official Solicitor, there were stated the steps taken by him to protect the interest of a respondent in such cases. They were (i) to ascertain (a) if there were any evidence that the respondent's illness was caused by the petitioner, (b) whether the petitioner had pursued a course of conduct which would enable a cross-petition to be filed, or would necessitate the peti- G

H

tioner's filing a discretion statement, (c) the medical history of the respondent, if possible, from the Board of Control, and at any hospital where the respondent had been detained, (d) the petitioner's means and the manner in which the respondent had been maintained since the illness, so that the question of the respondent's permanent maintenance might be properly placed before the court, and (ii) to instruct an independent medical man to visit the respondent and to report on her mental condition.

S. E. Karminski for the petitioner.

Theodore Turner for the guardian *ad litem*.

B

SIR BOYD MERRIMAN, P.: The evidence is clear that this is a case of incurable secondary dementia. The interests of the respondent have been safeguarded by the Official Solicitor, who has made an independent inquiry into the medical history of the case and the prospect of recovery. The result of that inquiry is that the evidence in support of the petition remains unchallenged, and is conclusive. It is right and proper that there should be an inquiry into the petitioner's means, in order that satisfactory arrangements may be made for the maintenance of the respondent. The arrangements here made seem to be entirely satisfactory, and will be embodied in the order of the court.

D

There will be a decree *nisi*, and an order for the costs of the Official Solicitor to be paid by the petitioner.

Solicitors: *Lewis & Lewis* (for the petitioner); *Official Solicitor* (for the respondent).

E

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

BOYD v. BOYD Disapproved. SIMPSON v. SIMPSON. [1951] 1 All E.R. 955. 151 p. 370

F

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **October 14, 1938.**]

Divorce—Desertion—Constructive desertion—Desire of offending party to continue cohabitation.

G

The respondent was convicted of incest and served a term of imprisonment. Upon his release his wife forgave him and resumed cohabitation. The respondent did nothing to support the petitioner, and in 1933 was convicted upon a charge of indecent assault on a girl of 13 years of age. Upon his second release he came back to the petitioner again, but she refused to have any more to do with him. The petitioner now asked for a divorce upon the ground of desertion without cause for a period of at least 3 years immediately preceding the petition:—

H

HELD: the facts did not establish a case of constructive desertion. It is essential, in a case of constructive desertion, to prove an intention on the part of the party charged with desertion to bring the cohabitation to an end.

[EDITORIAL NOTE.] There are cases where the innocent party is forced by the conduct of the offending spouse to leave the matrimonial home or to bring the cohabitation to an end. In order that such circumstances may amount to con-

structive desertion, it is necessary to show that, at least, the offending party did not desire to continue the cohabitation.

AS TO CONSTRUCTIVE DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-656, para 964; and FOR CASES, see DIGEST, Vol. 27, pp. 315, 316, Nos. 2930-2939.]

Cases referred to :

- (1) *Thompson v. Thompson* (1901), 85 L.T. 172; 27 Digest 290, 2648.
- (2) *Bosworthick v. Bosworthick* (1901), 86 L.T. 121; 27 Digest 306, 2836.

WIFE'S PETITION for divorce on the ground of desertion for a period of at least 3 years before the presentation of the petition. The question that arose was whether the facts amounted to constructive desertion.

John Latey for the petitioner.

BUCKNILL, J. : The petitioner was married on Apr. 29, 1923, to Charles Boyd, who was a widower with two daughters. A child was born of the marriage in Aug., 1925.

In 1926, the respondent was convicted of the crime of incest with his daughter by the first marriage, and was sentenced to 5 years' penal servitude. When he came out of prison after serving his sentence, the petitioner forgave him and took him back to live with her, and, of course, thereby condoned the adultery in respect of which she could then have obtained a decree. The respondent did nothing to support the petitioner, but she continued to live with him, and in 1933 he was convicted of an indecent assault on a girl under 13 years of age, and was sentenced to imprisonment with hard labour for 20 months. That was a terrible shock to the petitioner, and endangered her health. When he came out in 1935, after serving his sentence, he came back to see her, and in effect asked to be taken back again. The petitioner felt that she could not trust him any more, and refused to have any more to do with him.

Under the new Act, a decree of divorce can be obtained if the husband has deserted the petitioner without cause for a period of at least 3 years immediately preceding the presentation of the petition. The petition in this case as filed charges the husband with desertion for a period of at least 3 years immediately preceding the presentation of the petition, which takes one back to the time when he came out of prison for the second offence.

Mr. John Latey, who put forward the case very clearly and cited *Thompson v. Thompson* (1) and *Bosworthick v. Bosworthick* (2) to me, says that this is a case of constructive desertion. He says that in effect the husband has behaved in such a way that his wife cannot be expected to live with him any longer. It seems to me that the essential element of desertion must be an intention to bring the cohabitation to an end. It may be that the husband has behaved so badly that his wife leaves him, and it may be that his conduct amounts to cruelty, when the wife can get a divorce on that ground, but, before there can be a case of constructive desertion, the court must be satisfied that the conduct of

the husband was such as to show a clear intention on his part to drive the wife away. There must be an intention on the part of the person charged with desertion to bring the cohabitation to an end. There is no evidence here of any such intention. The man seems to be a sexual pervert who is unable to control himself, but there is no evidence that at any time he has ceased to wish to live with his wife. It was his wife, on the other hand, who refused to live with him. That seems to me to be quite clear, therefore, that no case of constructive desertion has been made out.

Mr. Latey has asked me to adjourn the petition in order that he may consider whether he should amend the petition and include the charge of cruelty. That being so, I merely state my finding on the petition as it is, and adjourn the final consideration of a decree for that purpose.

Solicitors: *S. A. Bailey & Co.* (for the petitioner).

[*Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.*]

JOYNSON'S EXECUTORS v. LIVERPOOL CORPORATION.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 26, 1938.**]

Rates and Rating—Payment—Full rate—Reduced to "composition rates and rents" if paid within prescribed time—Second half of reduced amount due on a Sunday—Demand note stating Monday as day for payment—Cheque posted on Monday—Whether payment in time—Validity of demand note.

A complaint was preferred against the appellants for that they, being persons duly rated and assessed in respect of certain premises, had not paid the sum of £17 17s. 6d., the balance of rates and water rents. The total amount due was £48 5s., but the appellants were entitled by statute to an abatement which would reduce the total due to £30 7s. 6d., payable in two instalments, provided the second instalment was paid on or before the expiration of seven months from Apr. 7, 1937—that is, Nov. 7, 1937. Nov. 7, 1937, was a Sunday, and the respondents in their demand note stated the date of payment of the second instalment as Nov. 8, 1937. On Nov. 8, 1937, the appellants posted a cheque for the amount of the second instalment, and this was delivered to the respondents on Nov. 9, 1937. The respondents on Nov. 15, 1937, thereupon demanded from the appellants the sum of £17 17s. 6d., being the difference between the full amount of the rates and water rents and the reduced amount as abated, on the ground that they were liable to pay the full amount owing to their failure to pay the second instalment on or before the expiration of seven months from Apr. 7, 1937. The stipendiary magistrate held that payment had not been received until Nov. 9, 1937, the Post Office authorities not being the respondents' agents to receive such payment, and issued a warrant of distress for £17 19s. 6d., being the sum demanded and 2s. costs. Thereupon, this appeal was brought, and the appellants contended that they had paid the second instalment "on the expiration of seven months" from Apr. 7, 1937, as the words "on the expiration of seven months" must be construed as meaning after, or at a reasonable time after, the expiration of seven months, and that, the Post Office having become the agents of the respondents to receive payment, the second instalment was received by the respondents on Nov. 8, 1937, when the cheque was posted:—

HELD: (i) the Post Office were not the agents of the corporation,

and therefore the date of payment was not the date on which the cheque was posted.

(ii) as the second instalment had not been paid within the time prescribed, the respondents were justified in demanding the full amount of the rate.

(iii) where the statutory period ended on a Sunday, the corporation were entitled in their demand note to state the following day as the day of payment, and the demand note was not invalid by reason of that statement.

[EDITORIAL NOTE.] This case, though decided under a local Act, is founded upon principles which make it practically generally applicable. The decision clears up matters of procedure in the collection of rates which have for some time been the subject of discussion. The chief interest lies in the question whether the Post Office are the agents of the rating authority. Although the judgment does not deal specifically with this point, the court seems to have been clear that this is not the proper legal inference to make in the circumstances.

AS TO PAYMENT OF RATES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 524, 525, para. 972; and FOR CASES, see DIGEST, Vol. 38, pp. 625, 626, Nos. 1455-1460.]

Cases referred to:

- (1) *Altrincham Electric Supply, Ltd. v. Sale Urban District Council* (1936), 154 L.T. 379; Digest Supp.
- (2) *Norman v. Ricketts* (1886), 3 T.L.R. 182; 12 Digest 472, 3852.
- (3) *Rowberry v. Morgan* (1854), 9 Exch. 730; 42 Digest 960, 338; 23 L.J.Ex. 191; 23 L.T.O.S. 129.

APPEAL by way of case stated from a decision of the stipendiary magistrate of the city of Liverpool. The appellants, as the executors of Joseph Joynson, deceased, were rated as the owners of certain property within the rating area of the city of Liverpool. Under the provisions of the Liverpool Corporation Act, 1921, owners were entitled to an abatement of 37½ per cent. of the amount of the general rate, and 25 per cent. of the amount of the water rent. By sect. 533 (5) of the above Act, the owner might pay the whole of the amount payable in respect of the rate on or before the expiration of four months from the date of the making of the rate, or, in the alternative, he might pay one-half of the amount before the expiration of two months from that date and the other half on or before the expiration of seven months therefrom. In default of such payment, the owner was liable to pay the whole amount of the rate without any abatement.

The Liverpool Corporation made a general rate for 1937-1938 on Apr. 7, 1937. The full amount of such rate that the appellants were liable to pay was £48 5s., and the amount after abatement was £30 7s. 6d. A demand note was duly served upon the appellants, and they paid the first instalment on or before June 7, 1937—i.e., within the time prescribed by the statute. The period for the payment of the second instalment expired on Nov. 7, 1937, which was a Sunday, and the corporation, as a matter of convenience, fixed Nov. 8, 1937, as the date for payment of the second instalment. On Nov. 8, 1937, at some time before 9.30 p.m., the appellants posted in the city a pre-paid letter addressed to the corporation and containing a cheque for the second instalment of the

composition rate, and the letter containing the cheque was duly received by the corporation on Nov. 9, 1937. Thereupon, contending that this payment was out of time, the corporation demanded payment of the difference between the full amount of the rate and the compounded amount.

- A On behalf of the appellants, it was contended that the words "on the expiration of seven months" must be construed literally, and therefore meant after, or at a reasonable time after, the expiration of seven months. They referred to *Altrincham Electric Supply, Ltd. v. Sale Urban District Council* (1). They further contended that they were authorised,
- B either expressly or by implication, to pay the composition rate by cheque and through the post, and that the Post Office became the agents of the corporation to receive such payment, and that, therefore, the payment was made on Nov. 8, 1937, when the cheque was posted. On this point, they relied upon *Norman v. Ricketts* (2). In addition, it was contended
- C that the demand note issued in respect of the rate was bad, inasmuch as, by stating Nov. 8 as the date of payment of the second instalment, it did not comply with the terms of the statute, the stated date being more than seven months after Apr. 7, 1937, when the rate was made. *Rowberry v. Morgan* (3) was relied upon in this connection.
- D The respondents contended the contrary of these contentions.
F. Kirkland Glazebrook for the appellants.
A. M. Trustram Eve, K.C., and *Basil Nield* for the respondents.

LORD HEWART, L.C.J.: This is a case stated by the stipendiary magistrate for the city of Liverpool under the Summary Jurisdiction

E Acts, 1857 and 1879, and, if I may say so, it is stated with the utmost clearness. The question we have to decide is whether the stipendiary magistrate was right in coming to the conclusions to which he did come. His conclusions are set out in para. 7 of the case, where the magistrate

F sets out his opinion as follows:

- (a) That the second half of the composition rates and rents had not been paid by the appellants on or before the expiration of seven months from Apr. 7, 1937; and (b) that payment of the second half of the composition rates and rents had not been received by the respondents until Nov. 9, 1937, the Post Office not being their agents to receive such payment; and (c) that under the circumstances and as a matter only of convenience of collection and as between themselves and the appellants, the respondents were legally entitled to fix the last date for payment
- G of the second half of the composition rates and rents as Nov. 8, 1937, and properly inserted such date in the demand note, which was duly served on the appellants on or about May 16, 1937, and that such demand note was therefore a good demand note; and (d) that it was clear from the fact that the appellants paid the first half of the composition rates and rents on June 7, and from their subsequent behaviour up to Nov. 8, that the appellants then accepted such last-mentioned demand note as valid and therefore were not entitled to ask the court in these
- H proceedings to find such note to be bad or invalid.

The magistrate decided to issue a warrant of distress for £17 19s. 6d., being the sum of £17 17s. 6d., the difference referred to in subparas. (d), (f) and (j) of the main paragraph of the case, and 2s. costs.

The question for this court is whether, upon the facts stated, the magistrate came to a correct determination and decision in point of law.

We have listened to an ingenious argument by Mr. Glazebrook in this case, but I think that it is only necessary to say that the magistrate was manifestly right in his decision, and the answer to his question as to whether he made a correct determination and decision in point of law is in the affirmative. This appeal, therefore, fails.

CHARLES, J. : I agree.

MACNAGHTEN, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Hair & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the appellants) ; *F. Venn & Co.*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

JARVIS v. CAMBRIDGESHIRE RURAL ASSESSMENT AREA ASSESSMENT COMMITTEE.

DAWSON v. CAMBRIDGESHIRE RURAL ASSESSMENT AREA ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 27, 1938.**]

Rates and Rating—Agricultural hereditament—Land partly used for training racehorses—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 2.

About 12 acres of land which were owned by the second appellant, and which had formerly been part of an arable farm, had some 10 years ago been laid down to grass and used by the first appellant as a training ground for racehorses from about Christmas until about the beginning of March. The second appellant during the remainder of the year had used the ground for grazing and hay. It was contended that the ground was "kept or preserved mainly or exclusively for purposes of sport or recreation," and was not, therefore, an agricultural hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 :—

HELD : the hereditament was an agricultural hereditament.

[EDITORIAL NOTE. The Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), expressly excepts "land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a race-course," from the definition of "agricultural land." The question has from time to time arisen how far land may be used for one of these excepted purposes and still be within the definition, and in such case the difficulty is still greater where the use, as here, is of a pastoral kind, which might itself conceivably be deemed agricultural. It will be noted that only the preliminary training of the racehorses could be carried out on the land here in question.

AS TO AGRICULTURAL LAND, see HALSBURY, Hailsham Edn., Vol. 27, pp. 378, 379, para. 809 ; and FOR CASES, see DIGEST, Vol. 38, pp. 458, 459, Nos. 230-234.]

Case referred to :

(1) *Tattersall v. Marlborough Area Assessment Committee*, Unreported.

APPEAL by way of case stated against a decision of the rating appeals committee of the court of quarter sessions for the county of Cambridge.

A hereditament was described in the valuation list as an exercise ground in the occupation of the first appellant and owned by the second appellant. The hereditament, consisting of an unenclosed area of about 12 acres, and forming part of a farm occupied by the second appellant, was, until 10 or 12 years ago, part of the arable land of the farm, and was then put down to grass by the second appellant at the request of one D., a trainer of racehorses, and in return for a substantial payment made by D. to the second appellant. Subsequently the first appellant and D. became associated, and were both orally licensed by the second appellant to exercise or train racehorses on the hereditament. No written agreement was made. The first appellant gained a livelihood by training horses for flat racing for various owners, and did not use the hereditament before Christmas or after the first week in March, and usually not after the end of February. The horses were not, and could not be, fully trained there, and the first appellant carried out most of his training elsewhere. The hereditament was used by the second appellant for mowing or grazing in connection with his other farming activities, and for the last two years had been mown for hay, which was consumed upon the farm, while in the previous year sheep grazed upon it. The second appellant kept two hunters during the period of the licence to the first appellant, and exercised them upon the hereditament when it was not being used by the first appellant.

The appellants contended that, as the hereditament was not "used as arable meadow or pasture ground only," and was "kept or preserved mainly or exclusively for purposes of sport or recreation," it was not an agricultural hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2. Further, they contended that, as the first appellant used the hereditament in substance as a training gallop for part of the training of racehorses, and enjoyed the exclusive use of it for that purpose, he was therefore in rateable occupation of the hereditament.

The respondents contended that, upon the facts, the hereditament was used as meadow or pasture ground only, and was not kept or preserved mainly for sport or recreation, and that the predominant user of the hereditament was by the second appellant, and that he, and not the first appellant, was in rateable occupation thereof.

The rating appeals committee held that the hereditament was an agricultural hereditament, and that the first appellant had no rateable occupation of it. Thereupon, this appeal was brought.

The Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), provides as follows :

In this Act the following expressions have the meanings hereby respectively assigned to them : "Agricultural land" means any land used as arable meadow or pasture ground only, land used for a plantation or a wood or for the growth of saleable underwood, land exceeding one quarter of an acre used for the purpose of poultry farming, cottage gardens exceeding one quarter of an acre, market gardens, nursery grounds, orchards or allotments, including allotment gardens within the meaning of the Allotments Act, 1922, but does not include land occupied

together with a house as a park, gardens (other than as aforesaid) pleasure grounds, or land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a race-course; and for the purpose of this definition the expression "cottage garden" means a garden attached to a house occupied as a dwelling by a person of the labouring classes. . . .

R. M. Montgomery, K.C., and Colin Pearson for the appellants.

A. M. Trustram Eve, K.C., and Gerald Howard for the respondents.

LORD HEWART, L.C.J.: This is a case stated for the opinion of this court, in accordance with the provisions of the Rating and Valuation Act, 1925, s. 7 (1). The facts are very clearly stated in the case. The simple question to which it gives rise is whether the hereditament referred to is to be regarded as an agricultural hereditament. In my opinion, the conclusion at which the rating appeals committee of the court of quarter sessions for the county of Cambridge have arrived is correct. The committee were of opinion that, on the facts submitted to them, the hereditament was an agricultural hereditament, and that the appellant Jarvis only occupied an agricultural holding. I am fortified in the view that that was the correct conclusion, in particular when I look at the opinion of LORD WARRINGTON, in *Tattersall v. Marlborough Area Assessment Committee* (1), of which we have had the advantage of reading a transcript. I think, therefore, that this appeal fails, and ought to be dismissed.

CHARLES, J.: I agree.

MACNAGHTEN, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Field, Roscoe & Co.*, agents for *Guy W. Stanley & Shaw*, Cambridge (for the appellants); *Blyth, Dutton, Hartley & Blyth*, agents for *W. J. & J. G. Taylor*, Newmarket (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

COHEN v. J. LESTER, LTD.

[KING'S BENCH DIVISION (Tucker, J.), **October 21, 1938.**]

Moneylending—Insufficient memorandum of loan—Unenforceable contract—Right to return of security for loan—Whether plaintiff put upon terms—Moneylenders Act, 1927 (c. 21), ss. 5 (6), 6.

Upon a loan by moneylenders, the borrower deposited with the lenders jewellery alleged to be worth £200. It was admitted that the memorandum of the contract did not comply with the terms of the Moneylenders Act, 1927, s. 6, and that the contract was therefore unenforceable. The claim was therefore restricted to a claim for the return of the jewellery, and it was contended that the plaintiff was not entitled to such return without paying all sums due under the contract of loan, as he was asking for the exercise of the equitable jurisdiction of the court:—

HELD: the plaintiff was entitled to the return of the jewellery without being put upon terms, as in seeking to enforce such terms the defendant was seeking to enforce the loan contract, which, by reason of the statute, was unenforceable.

[EDITORIAL NOTE. In dealing with a transaction which was illegal under the Moneylenders Act, 1900, s. 2, the court refused to order the delivery up of securities except upon the terms that the mortgagor should repay the money advanced to him. This decision was apparently based upon the principle that a party to an illegal contract cannot be heard in court otherwise than upon an application to the equitable jurisdiction of the court. It is essential in such an application that the applicant shall come prepared to do everything which is just, not only from the point of view of law, but also from that of conscience. In the present case, the contract was not an illegal one, for the Act of 1927 merely makes such a contract unenforceable. Upon this, the court has drawn a distinction, and has held that in the present case the plaintiff is not to be put upon terms. It is suggested, on the contrary, that the defendant, in asking that the plaintiff should be put upon terms, is in fact seeking to enforce the unenforceable contract.]

AS TO RELIEF APART FROM MONEYLENDERS ACTS, see HALSBURY, Hailsham Edn., Vol. 23, p. 206, para. 310; and FOR CASES, see DIGEST, Vol. 35, p. 218, Nos. 450-452.]

Cases referred to :

- (1) *Re Chetwynd's Estate, Dunn Trust, Ltd. v. Brown*, [1937] 3 All E.R. 530; Digest Supp.; 106 L.J.Ch. 330; 157 L.T. 125.
- (2) *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; 35 Digest 205, 303; 76 L.J.Ch. 187; 96 L.T. 301.
- (3) *Egan v. Langham Investments, Ltd.*, [1938] 1 K.B. 667; [1938] 1 All E.R. 193; Digest Supp.; 107 L.J.K.B. 337; 159 L.T. 118.
- (4) *Stuart Neals v. London & Westminster Loan Discount Co., Ltd.* (1937), Unreported, Dec. 21.

ACTION for the return of jewellery deposited with moneylenders as security for a loan.

Harry Samuels for the plaintiff.

Cyril B. Salmon for the defendants.

TUCKER, J. : This is an action brought by Mrs. Hilda Cohen, as plaintiff, against J. Lester, Ltd., moneylenders. The facts are not in dispute, but the point raised involves a new point under the Moneylenders Act, 1927. The facts are these. There were four transactions between the plaintiff, the borrower, and the defendants, the moneylenders. The contracts of loan were made on July 12, 1934, July 4, 1935, May 11, 1936, and Apr. 13, 1937. The nominal amounts advanced on those days were £200 on the first occasion, £232 on the second occasion, £250 on the third occasion, and £250 on the fourth occasion. The contractual rates of interest were 20 per cent. on the first occasion and 25 per cent. on the other occasions. Then there were certain terms of repayment, but, although those were the nominal amounts of the advances, in fact the money received on the second, third and fourth occasions was not as much as that shown, because part of the money agreed to be lent was applied to the repayment of the first loan, and the amount actually received in cash on the second loan of July 4, 1935, was £49 13s. 7d. The amount received on the third loan, that of May 11, 1936, was £73 3s. 9d., and on the last occasion, Apr. 13, 1937, it was £68 9s., the total cash received being £391 6s. 4d., and there has been repaid altogether the sum of £365.

The action is brought claiming a declaration that these contracts and the promissory notes in respect of each of them are illegal, void and unenforceable, by reason of non-compliance with the Moneylenders Act, 1927. The plaintiff claims cancellation and delivery up of the promissory note dated Apr. 13, 1937, an injunction to restrain the defendants from taking any steps to seize, sell or otherwise dispose of the jewellery, more particularly described in the contract of Apr. 13, 1937, and an order for the delivery up of the jewellery and such further and other relief as the court may deem fit. The jewellery referred to in that claim was jewellery which had been deposited by the borrower with the defendants on the occasion of each of the transactions in question. The jewellery is alleged by the plaintiff to be of £200 in value, but that actual amount is not admitted. That is to say, the value is not admitted. It was a term of the first transaction that part of the amount contracted to be advanced should be paid to Messrs. Percy, of Deansgate, Manchester, for the purpose of redeeming the jewellery, in order that it should be deposited with the defendants, and the jewellery has at all times remained deposited with the defendants. . There is no question in the case raised with regard to the rate of interest being excessive, or anything of that kind, but it is said and admitted that the provisions of the Moneylenders Act, 1927, s. 6, were not complied with, on the grounds that :

The note or memorandum of contract in respect of each of the said transactions and/or the copy thereof did not show that it was a term thereof that in the event of default of payment of any instalment the jewellery might be sold by the defendants. (b) The note or memorandum of contract in respect of the first transaction did not show (i) any agreement that part of the amount contracted to be advanced should be deducted and paid to Messrs. Percy aforesaid ; (ii) the amount so deducted. (c) The note or memorandum in respect of each of the second, third and fourth transactions did not show how the amounts to be paid by the plaintiff in respect of the previous transactions were made up—that is to say, the respective portions allocated to principal and interest respectively. (d) The note or memorandum in respect of the third and fourth transactions did not show that the amounts stated by the defendants to be due in respect of the previous transaction should be deducted by them from the principal moneys to be advanced.

The defendants in their defence admit each and every allegation of fact contained in the statement of claim except that the jewellery was worth £200. They say, by para. 2, that they

. . . are willing to submit to (a) a declaration that the contracts and promissory notes and each of them referred to in the statement of claim are unenforceable, (b) an injunction in the terms prayed for in the statement of claim, and (c) an order for the cancellation or delivery up of the promissory note dated Apr. 13, 1937.

By para. 3, however, they say :

The defendants whilst admitting that they have no enforceable claim in respect of the transaction of Apr. 13, 1937, deny that the said transaction was void or illegal as alleged or at all and say that there is due and owing to them the sum of £232 10s. 4d. thereunder and that accordingly until the plaintiff pays to the defendants the said sum the plaintiff is not entitled to the delivery up of the said jewellery.

It is agreed by Mr. Samuels, for the plaintiff, that the sum of £232 10s. 4d. is the amount payable under the contracts which were made, which contracts are admitted to be unenforceable contracts. That is the sum which, under those contracts, remains payable.

The point which Mr. Cyril Salmon, for the defendants, makes is this. He says that the Moneylenders Act, 1927, s. 6, does not say that a contract which does not comply with the provisions of that section is void or illegal, but says :

- A No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within 7 days of the making of the contract ; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid
- B was not signed by the borrower before the money was lent or before the security was given as the case may be.

The words, it is to be noted, are : " No contract . . . and no security given . . . in respect of any such contract shall be enforceable."

- C Mr. Salmon drew attention to the phraseology of sect. 5 (6), where the words used are :

Where it is shown that a money-lending transaction was brought about by a contravention of any of the provisions of this section, the transaction shall, notwithstanding that the moneylender was duly licensed under this Act, be illegal, unless the moneylender proves that the contravention occurred without his consent or connivance.

- D The fact that, under sect. 6, the contract and security are unenforceable, and not void or illegal, is manifest from the words of SIR WILFRID GREENE, M.R., in *Re Chetwynd's Estate, Dunn Trust, Ltd. v. Brown* (1). Mr. Salmon says that the plaintiff is here applying to the equitable jurisdiction of the court, and that, that being so, the plaintiff can get the
- E relief that she asks—that is to say, an order for the return of the jewellery—only on the terms of her paying the sum of £232 10s. 4d. which is due. He invokes the principle that he who comes to equity must come with clean hands, and says that it would be inequitable to order the return of the jewellery when the money owing under the contracts has not been
- F paid. He says that the case is as strong as, or stronger than, the case of *Lodge v. National Union Investment Co., Ltd.* (2). That was a case where the borrower was applying in a Chancery action to recover securities mortgaged to an unregistered moneylender. The headnote is as follows :

- G In an equitable action by a borrower to recover securities mortgaged to an unregistered money-lender the mortgagee will not be ordered to give up to the mortgagor the securities the subject of the mortgage except upon the terms that the mortgagor shall repay the money which has been advanced to him. (*Quære*, what would be the result of an action at common law for this purpose ? Authorities on the old usury law considered and applied.

- H It is to be observed that in that case the transaction in question was one which was an illegal one because it is expressly so stated by the Moneylenders Act, 1900, s. 2—that is, a moneylending transaction by an unregistered moneylender is illegal. The action was brought claiming a declaration that the contracts and transactions were illegal and void against the plaintiff, asking for the delivery up of the assignments, bills of exchange and securities, and repayment of the sum of £150 due on

the bills, or, alternatively, certain declarations. PARKER, J., as he then was, pointed out in his judgment, at p. 306 :

The usual rule is that in the case of a transaction void for illegality neither party can take any proceedings against the other party for the restoration of any property or for the repayment of any money which has been transferred or paid in the course of the illegal transaction. To this rule, however, there are exceptions, one of them being in favour of the persons for whose protection the illegality of the contract has been created, and in the authorities I have mentioned it has been held that in the case of loan transactions void under the Act of 1900 the borrower is within that exception. The illegality of the transaction, therefore, does not preclude the plaintiff from maintaining this action. The defendants, however, maintain that, this being an appeal to the equitable jurisdiction of the court, the plaintiff can be put upon terms and not allowed to assert any equity unless he himself is prepared to do equity by repaying the £1,075 less the £150 paid for the privilege of renewing the bills, and certain sums which they are willing to allow him to deduct which I need not refer to in detail.

Then PARKER, J., proceeds to decide that that contention on the part of the defendants is a good one, and that the plaintiff can get back the security only on payment of the money due. That proceeds on the basis that the application was an appeal to the equitable jurisdiction of the court, that it was an application by somebody who was a party to an illegal contract, who, ordinarily speaking, would not have been heard to come into court at all, but who, by reason of the exceptions in the provisions in the statute in question, being a statute passed for the benefit of the protection of borrowers, was entitled in that case to come to the court, but, if he did so, could come to the court only on certain terms. That is the position with regard to an illegal contract. It is quite true that in this case the contracts made were not illegal contracts, and, in considering the position of a person seeking the protection of the Money-lenders Act, 1927, in respect of defaults under sect. 6 (whatever the position may be with regard to other parts of the Act, where transactions are made illegal), under sect. 6, at any rate, contracts and securities are not made illegal, but are only made unenforceable. What I have to decide is whether there is a distinction between contracts which are stated to be illegal and those which are stated to be unenforceable with regard to the principles applicable to obtaining relief and getting repayment of money paid by way of security. It is common ground that, under sect. 6, where there has been non-compliance, the borrower can apply to the court for relief, and amongst the relief that he can get is an order for the delivery up of promissory notes that have been given in respect of transactions, and also for the delivery up and/or cancellation of bills of sale that have been given by way of security. It has been decided, and it is accepted by counsel as being the law, that in those cases the borrower is not put upon terms as to repayment of the money that is due, but is entitled to keep the money he has received and nevertheless have a declaration made that the contracts under which he obtained the money are unenforceable, and so he is entitled to delivery up and cancellation of the notes and/or bills of sale given in pursuance of those contracts.

Mr. Salmon, however, says that it is different where jewellery or goods

actually have been deposited with the moneylender and he has possession of them. He says, and he agrees, that the security is unenforceable and that the contract is unenforceable, but he says : " I am not seeking to enforce the security. I am only saying that, before an order can be made against me for delivery up, the plaintiff must put himself right with equity." I think, on the whole, that Mr. Salmon is seeking to enforce the contract by saying : " I am entitled to keep the jewellery." It is clear that his only title to keep the jewellery is derived from these unenforceable contracts, and I think in fact that para. 3 of his defence is a claim to enforce his security. It is quite true that he is not claiming to realise his security by sale, but I think that, when he says, " I am entitled to keep this jewellery, and I refuse to hand it over to you except on terms of paying money due under the contracts," he is doing the very thing which sect. 6 says cannot be done—that is, he is seeking to enforce a contract which the statute has said shall be unenforceable. I think that he is none the less seeking to enforce it because he sets up his claim in a defence, and not in a counterclaim, or in a statement of claim in an action brought for that purpose. I think that a distinction has to be drawn between a case like that of *Lodge v. National Union Investment Co., Ltd.* (2), where the transaction was illegal, and a transaction of this kind, which the statute says shall be unenforceable. I think that the plaintiff's claim is entitled to succeed. I only point out in passing that two cases have been brought to my notice, one a decision of DU PARCQ, J., which is *Egan v. Langham Investments, Ltd.* (3), and an unreported decision of LEWIS, J., in *Stuart Neals v. London & Westminster Loan Discount Co., Ltd.* (4). In both those cases it appears that the claims were made in a statement of claim asking for declarations that certain transactions or bills of sale were illegal, void and/or unenforceable. It appears that in both those cases the judges said that the plaintiffs were entitled to a declaration as prayed, but no point was ever taken in either of those cases as to a distinction between contracts being illegal and void and their being unenforceable, and neither of the judges applied his mind to the question whether such contracts were illegal or merely unenforceable, or the precise form of declaration in a case of that kind.

I think that the plaintiff is entitled to a declaration that the contracts and promissory notes and each of them were and are unenforceable by reason of the non-compliance with the Moneylenders Act, 1927, and that the words " illegal and void " should not be in the declaration. It is agreed that she is entitled to the second claim—cancellation and delivery up of the promissory note of Apr. 13, 1937. It is agreed she is entitled to an injunction to restrain the defendants from taking any steps to sell or otherwise dispose of the jewellery, and I order that she is also entitled to delivery up of the jewellery and costs.

Solicitors : *Lieberman, Leigh & Co.* (for the plaintiff) ; *L. A. Finklestone & Co.* (for the defendants).

[Reported by GERALD ABRAHAMS, ESQ., Barrister-at-Law.]

Re T.R.M.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
October 17, 31, November 1, 1938.]

Lunacy—Rate-aided patient—Maintenance—Old age pension—Public assistance officer appointed receiver—Form of order—Widows', Orphans' and Old Age Contributory Pensions Act, 1936 (c. 33), s. 21 (1), Sched. III.

A patient in a rate-aided institution attained the age of 70 years, and became entitled to an old age pension. The master in lunacy made the usual order appointing the appropriate public assistance officer, in effect, to be receiver of the pension and to accumulate the same. The order gave a charge to the county council for any sum then due, and future sums becoming due, to them, but this charge was not to be enforceable without the leave of the master until the death of the patient. It was contended, on behalf of the county council, that the order should have made the pension immediately available:—

HELD: the order was not only one which the master had jurisdiction to make, but was also a wise and just one in the circumstances, and there was no reason for interfering with it.

[EDITORIAL NOTE. The object of orders made by the master in lunacy with reference to the patient's estate is to apply or conserve that estate in the best interest of the patient. In the circumstances of the present case, it is thought to be in the best interest of the patient that the pension should be accumulated, so that, if he should be discharged, there would be some small capital sum with which he might start life again. The order at the same time preserves the rights of the county council by giving a charge in their favour upon the accumulations exercisable after the death of the patient.

AS TO APPOINTMENT OF NOMINEE OF COUNTY COUNCIL AS RECEIVER, see HALSBURY, Hailsham Edn., Vol. 21, p. 407, para. 704 (5); and FOR CASES, see DIGEST, Vol. 33, pp. 257-259, Nos. 1761-1794.]

Cases referred to:

- (1) *Re Newbegin's Estate, Eggleton v. Newbegin* (1887), 36 Ch. D. 477; 37 Digest 230, 220; 56 L.J. Ch. 907; 57 L.T. 390.
- (2) *West Ham Union v. Pearson* (1890), 62 L.T. 638; 37 Digest 229, 210.
- (3) *Re Clabbon*, [1904] 2 Ch. 465; 37 Digest 229, 211; 73 L.J. Ch. 853; 91 L.T. 316.
- (4) *Pontypridd Union v. Drew*, [1927] 1 K.B. 214; 37 Digest 229, 214; 95 L.J.K.B. 1030; 136 L.T. 83.
- (5) *Wandsworth Union v. Worthington*, [1906] 1 K.B. 420; 37 Digest 230, 224; 75 L.J.K.B. 285; 95 L.T. 331.
- (6) *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94; 33 Digest 134, 104; 59 L.J. Ch. 298; 62 L.T. 342.
- (7) *Re Tye*, [1900] 1 Ch. 249; 33 Digest 166, 529; 69 L.J. Ch. 153; 81 L.T. 743.

APPEAL by the public assistance officer to the county council of Lincoln (Parts of Lindsey) against an order made by the assistant master in lunacy, dated Feb. 24, 1938. Under that order, the appellant was appointed receiver in the case of a person of unsound mind, who was an inmate of a rate-aided institution, and had no means of his own. It appeared that, though he had relatives, none of them was desirous of being appointed receiver. Accordingly, an application was made for the appointment of the public assistance officer as receiver, and he was duly appointed. It was against the other provisions of the order that the present appeal was brought. The order appointed the appellant receiver,

and gave him power to give a good discharge for any property, and particularly pensions, belonging to the patient. Para. 3 of the order directed him to lodge in court all sums received by him under that direction, and by the lodgment schedule, the money so lodged in court was to be accumulated. For all practical purposes, the only money that

A would come into court under that provision would be receipts in respect of pensions. Clause 4 of the order, stated shortly, gave to the county council a charge on the money for the time being in court for any sum then due, and future sums becoming due, to the county council in respect of the patient's maintenance. It went on to provide that the charge :

B . . . is not to be enforceable except with the leave of the master until the death of the patient and is to be the subject of any order of the master for the application for the benefit of the patient of the property charged, but before any such order is made notice is to be given to the charges.

C *T. A. C. Burgess* for the appellant, the public assistance officer to the county council of Lincoln (Parts of Lindsey).

Theodore F. Turner for the Crown.

Burgess : It is an admitted fact that the pension is being paid to the receiver who has been appointed. If a receiver had not been appointed, the pension would have ceased to be recoverable after three months, as

D the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, s. 21 (1) (b), limits the time for recovery to this period. The Lunacy Act, 1890, s. 300, implies a right of recoupment, because it enables an order for recoupment to be made and the order to be enforced. It has always been assumed that recoupment is allowed. The question involved

E is the power of the council to recover. I cannot maintain that there is a common law right to recover, as the earlier decisions were based upon the fact that relief had been voluntarily given by persons who were not compelled by statute to give it. Ever since the decision in *Re Newbegin's Estate, Eggleton v. Newbegin* (1), charging orders in favour of local

F authorities have been made by justices. Since the time of that decision, the power has not been challenged, and that case has been regarded as the commencement of what has been considered as the settled practice. [Counsel also referred to *West Ham Union v. Pearson* (2), *Re Clabbon* (3), *Pontypridd Union v. Drew* (4), *Waxdswoth Union v. Worthington* (5),

G *Re Rhodes, Rhodes v. Rhodes* (6) and *Re Tye* (7).]

Turner : Application was made that one of the officers of the council should be appointed receiver. Before these orders were made, a difficulty was found in obtaining a person to act as receiver. A suggestion was made that the local assistance officers should be appointed receivers.

H As a result of this proceeding, it is possible to accumulate a fund to enable a rate-aided person of unsound mind to start life again if he should recover. By means of such an order as that made in the present case, it has been found possible for the master to accumulate a fund to cover the small needs of such a case. The county council is protected because the county council could only recover three months' arrears of the

pension. The object of the order is to ensure that, if an old age pensioner is discharged, there will be this small sum to enable him to furnish a room and start again, and thus be kept from a state of poverty which would probably drive him back to the institution from which he had been discharged. This order not only protects the interest of the person of unsound mind, but also protects the interest of the local authority, A because, if the person is not discharged, the local authority gets the benefit of the sum accumulated. The sum of 2s. 6d. per week is spent upon providing additional comforts for the person, and it is the balance of 7s. 6d. per week which is accumulated.

SIR WILFRID GREENE, M.R. : The complaint that is made against the order by the appellant is shortly this. He says that, in place of the directions for payment into court and accumulation of the money received from time to time in respect of the patient's old age pension, the order should have provided that those sums should be applied for C maintenance, and he asks that paras. 3, 4 and 5 and the lodgment schedule should be deleted and the following paragraph substituted :

The net income of the patient is allowed for his maintenance.

Thus, what he is asking the court to do is to direct payment of this old D age pension in aid of the local rates.

It is necessary to state quite shortly what the nature of this pension is, and what rights exist with regard to it. It is an old age pension payable by reason of the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, when the patient reached 70 years of age. It used E to be the case that old age pensions ceased to be payable when the pensioner became rate-aided, but that has now been changed in certain respects. The material respect in which it stands changed at the present day in the case of rate-aided persons of unsound mind is that, in the case of an old age pension payable under this Act, it is provided by Sched. III F to the Act that the pension shall not cease to be payable by reason of the circumstance that the person of unsound mind is a rate-aided person. Nevertheless, although the right to the pension payments remains, that right, according to sect. 21 (1), must be exercised within three months after the date when a payment falls to be made. The result of that, of G course, is that, unless there is some hand to receive the pension on behalf of a person of unsound mind, he can never be entitled to any payment after three months have elapsed. Nevertheless, if there is one thing clear in this jurisdiction, it is, I think, that the legislature has quite clearly avoided providing for payment of old age pensions to local authorities H in aid of rates, either in the case of persons who are not of unsound mind or in the case of persons who are of unsound mind. That appears from one or two considerations which have a bearing on the present question. The Widows', Orphans' and Old Age Contributory Pensions Act, 1936, s. 32 (2), and the regulations made thereunder, provide for payment

to a local authority out of a pension of sums for the purpose of providing additional comforts for a pensioner of unsound mind detained in a rate-aided institution. Subject to that, the subsection contemplates that the pension remains the property of the pensioner, and certainly does not contemplate that the local authority is necessarily going to get it in aid of the rates. Under that subsection, the regulations that were made provide that a sum not exceeding 2s. 6d. per week shall be payable in respect of additional comforts for the pensioner, and the regulations use rather striking language :

B Provided that . . . where the pensioner has no such dependents there shall be paid to the authority such sum only as shall be required for the purpose of providing additional comforts for the pensioner.

Another set of regulations made under sect. 32 (1) (f) enables the Ministry of Health, in cases where there is nobody acting for that purpose, to appoint a person to act on behalf of a pensioner who is of unsound mind, and to receive the pension. We were told that it is not the practice to appoint local assistance officers under that paragraph, the Ministry taking the view—which appears to me, if I may say so, to be clear upon the face of the statute—that the statute does not contemplate that the pension is necessarily going to be received by the local authority in aid of rates. That does not mean, of course, that the court in lunacy ought to put the local assistance authority necessarily in a worse position than that in which it would have been in respect of property belonging to a lunatic. It seems to me that, so far as the statute is concerned, the sums received in respect of pension are the lunatic's property, and fall to be dealt with by the existing jurisdiction under the Lunacy Acts, and it is in that position that the matter has been left by the legislature. We therefore come to the conclusion that money received for old age pensions in respect of a lunatic who is a rate-aided person in a mental institution falls to be dealt with under the ordinary discretionary jurisdiction of the court. The difficulties which we are told arose are understandable, because it is possible that in cases of this kind the management and administration department would not hear of such cases, and it would be difficult in any case to find anybody to act as receiver. Accordingly, there was considered and adopted the very convenient practice of appointing as receiver the public assistance officer concerned, if he chose to apply. The benefit of that is this. First of all, the pension does not lapse, because there is somebody there with authority to receive it. From the point of view of the local authority, the benefit of that procedure is that the pension is obtained, and is not lost, and the rights of the local authority are preserved in the same way as the rights of creditors would be preserved under the lunacy jurisdiction. For that purpose, this form of order has been adopted. We are told that it has been adopted without question in some 2,000 cases, but that would not debar this court from saying that the order was wrong if we were convinced that it was wrong. Speaking for myself, I am quite con-

vinced, after the careful examination we have made, with the assistance of counsel on each side, that the order is one that not only could be, but was, properly made.

A number of matters were considered in the course of the argument, but many of them, although the discussion of them was extremely useful, I need not pursue. It is sufficient for me to say, first of all, on the question of jurisdiction to make the order, that the local authority which provides maintenance for a rate-aided person of unsound mind has certain statutory rights to obtain some reimbursement for what it has spent out of property belonging to that person. There is the Lunacy Act, 1890, s. 299. There is also the Poor Law Act, 1930, s. 20, under which certain recoveries may be had under a period of limitation of 12 months, and I am not sure that there are not some other statutory provisions under which, if the proper machinery is used, certain recoveries may be had. That has always been considered, so far as I read the cases to which we have been referred, as justifying the court in lunacy giving to the local authority which maintains the lunatic a right to reimbursement in some shape or form. There being ample jurisdiction, therefore, to make an order of this kind, by which the local authority would be able to reimburse itself, the sole question is whether this order is one which the master, in the exercise of his discretion, ought to have made. The object and purpose of the order are quite clear. It is intended, on the face of it, to reconcile in cases of this kind the interests of the lunatic and the just and fair claims of the local authority. Paramount, of course, is the interest of the lunatic. The rights of creditors in the case of a person of unsound mind are always dependent upon the interests of that person, and they may receive payment if, and only if, it is not detrimental to the person of unsound mind that they should have payment. In the present case, for practical purposes, so far as this appeal is concerned, we can treat the local authority as standing in a position equivalent to that of a creditor of the patient. In saying that, I am not to be taken to be expressing any opinion on the subject that has been discussed before us as to whether or not the true position is that of a creditor at common law or by statute, or matters of that kind. For practical purposes, they are being treated here as standing in the position of creditors. The effect and object of the order are, while preserving to them that right, to ensure that this pension, which is the only property of the patient, is not going straight into the pockets of the local authority as soon as it is received. Had it done so, the result would have been that, if the patient were to recover, he would go out of the institution without one penny in the world. That is not a situation which any prudent and reasonable administration of the lunacy jurisdiction can contemplate for one moment, and accordingly the order is passed to enable the court to keep its hand on an accumulation of pension moneys, with a view to ensuring that the patient, if and when he recovers, will, when he leaves the institution, be in a position to start life again.

If, on the other hand, he does not come out of the institution, but dies leaving that fund, then, under the order, the right of the local authority is preserved, and it can apply to be paid out of the fund in court. It seems to me that the order effects in a very wise and proper manner a just compromise between the rights of the local authority and the interests of the patient. The interests of the patient are protected, and so are those of the local authority. The misapprehension which I think must have given rise to the present appeal in the minds of the local authority concerned is that for some reason, or in some way, because they maintain this man out of the rates, they ought to be entitled to receive his old age pension. That, in my judgment, is an entire misconception. We were referred to orders which were made in cases where, in addition to being entitled to a pension, the person of unsound mind in a rate-aided institution had got some little property of his own, I think a matter of some £97 in the case quoted to us. In that case, the form of order was one under which it was intended, apparently, that the whole income of the patient should be applied for maintenance, and it appears to have been intended, under that order, that the receiver should apply for maintenance, not merely the income of the little bit of capital which the patient owned, but also the payments received in respect of his old age pension, and it was suggested that there was no reason why the order in those cases should not be used in the present case, so that the pension could be applied for maintenance. However, as it appears to me, there is all the difference in the world between the two cases. In the case to which we were referred, the patient had a small sum of capital, which was being preserved for him. If he recovered, he would have had that £97 to take away and to start himself in life again. Therefore, in the exercise of his discretion, the master took the view that it was not inconsistent with the true interests of the patient that the pension, and whatever income the £97 brought in, should be used for his maintenance. It would still leave the patient with his capital intact. In the present case, however, where the patient has nothing in the world except his pension, if and when he is discharged, if there is no accumulation, he will be placed in the position of leaving the institution without a penny. Therefore, the object of the order was to build up for him something which he had not got for himself—namely, a small capital, which would be available on his leaving, if he ever did leave. As soon as that sum is built up, he will stand in the same position as that of the person who starts with a little capital of his own. It seems to me that the order in the present case is one which the master had ample jurisdiction to make, and, moreover, that it is one which is not merely a perfectly proper and good order, but an extremely wise and just order, and I can see no reason for interfering with it.

I should like to say in conclusion that the matters discussed in this case have ranged over a number of topics, because it was of great importance to the court to be put in possession of all the legal considerations

affecting the matters underlying the claims of the local authority. We have received full assistance in that matter from counsel, and the fact that I have not thought it necessary to deal with many of the matters discussed does not mean that that discussion was not of great assistance, because in the result it became unnecessary to go into them in this judgment.

There is one matter to which I think I should refer, because it did arise in the course of the discussion. When the terms of the order are looked at, I think that they do not purport to impose any charge upon the pension itself. The charge is upon the funds in court, if and when they get there. Accordingly, it is not necessary to go into the question as to whether or not it would be competent to impose a charge upon a pension under this Act, having regard to the statutory provisions which deal with it. Therefore, I must not be taken to be expressing any opinion one way or the other upon that subject. The appeal, therefore, must be dismissed.

SCOTT, L.J. : I agree.

CLAUSON, L.J. : I agree.

Solicitors : *Taylor, Jelf & Co.* (for the appellant) ; *Official Solicitor* (for the Crown).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

LIVERPOOL CORPORATION *v.* ARTHUR MAIDEN, LTD.

[LIVERPOOL MICHAELMAS ASSIZES (Croom-Johnson, J.), **October 25, 26, 1938.**]

Public Health—Advertisements—Licence—Right of local authority to charge fee for grant of licence—“Under and subject to such terms and conditions to be therein prescribed as the corporation may deem proper”—Liverpool Corporation (General Powers) Act, 1930 (c. cxii), s. 29.

Under the provisions of a local Act, the defendants were granted licences for the erection of advertisements on houses, and in respect of each licence the corporation asked for a fee, in some cases of 10s. 6d. and in others of £1 1s. It was contended that they were entitled to do so because the Act provided that the licences might be granted under and subject to such terms and conditions as the corporation might deem proper :—

HELD : upon the construction of the Act, the terms and conditions could not include the payment of a fee in respect of the granting of the licence.

[**EDITORIAL NOTE.** The decision in the present case is one under a local Act—the Liverpool Corporation (General Powers) Act, 1930—but it would appear clearly to follow from the judgment herein that a local authority has no power to demand any fee in respect of a licence granted by them, unless such power is especially given by statute.

AS TO LICENCES TO ERECT ADVERTISEMENTS, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 520, 521, para. 1104 ; and FOR CASES, see DIGEST, Vol. 38, pp. 178, 179, Nos. 201-204.]

Cases referred to :

- (1) *A.-G. v. Wilts United Dairies* (1922), 91 L.J.K.B. 897 ; 25 Digest 132, 519 ; 127 L.T. 822 ; on appeal from 37 T.L.R. 884.
- (2) *Gosling v. Veley* (1847), 7 Q.B. 406 ; 13 Digest 287, 186 ; 16 L.J.Q.B. 201 ; sub nom. *Gosling v. Veley, Braintree Church Rate Case*, 8 L.T.O.S. 555 ; affd. (1850), 12 Q.B. 328 ; revsd. on other grounds (1853), 4 H.L.Cas. 679.
- A (3) *Southwark Corpn. v. Partington Advertising Co.* (1905), 69 J.P. 183 ; 12 Digest 209, 1685.
- (4) *Brocklebank, Ltd. v. R.*, [1925] 1 K.B. 52 ; Digest Supp. ; 94 L.J.K.B. 26 ; 132 L.T. 166 ; revsg., [1924] 1 K.B. 647.
- (5) *Swansea Improvements & Tramways Co. v. Swansea & Mumbles Ry. Co., Ltd.* (1880), 3 Ry. & Can. Tr. Cas. 339 ; 42 Digest 739, 1632.

B

ACTION claiming fees due in respect of the previous granting to the defendants of certain licences to post bills on certain hoardings. The licences were granted under the Liverpool Corporation Act, 1921, and the Liverpool Corporation Act, 1930. The facts and arguments are fully stated in the judgment.

C

F. E. Pritchard, K.C., *Basil Nield* and *Francis Smith* for the plaintiffs.
G. J. Lynskey, K.C., and *Hartley Shawcross* for the defendants.

D

CROOM-JOHNSON, J. : By the Liverpool Corporation Act, 1921, the local Acts in force within the city of Liverpool were consolidated, with amendments, and the Royal Assent was given to that statute on Aug. 4, 1921. By sect. 290 of that statute, it was provided as follows :

E

Every hoard or similar structure to be used either partly or wholly for advertising purposes in or abutting on or adjoining any street shall be securely erected to the satisfaction of the corporation. . . .

F

Then there are provisions in that statute which deal with the question of the height at which it shall be lawful to erect any hoarding or structure to be used either partly or wholly for advertising purposes. Subsect. (3) goes on to provide as follows :

G

The owner or other person using any hoard, wall or other structure for advertising purposes, whether erected before or after the passing of this Act shall at all times hereafter keep and maintain the same in proper and safe repair and condition to the satisfaction of the corporation, and in the event of any nuisance being created in any street by reason of the falling off of any papers affixed for advertising purposes to such hoard, wall or other structure, shall forthwith remove and clear away such papers.

H

Subsect. (4) then provides for a penalty to be imposed upon anybody who acted in contravention of the provisions of that section. Apparently those provisions were not wholly satisfactory, for in 1930 there was passed the Liverpool Corporation (General Powers) Act of that year, which received the Royal Assent on July 10, 1930. Under sect. 29 of that statute there was set up a system of licensing for advertisements. That section provides as follows :

From and after Jan. 1, 1934, it shall not be lawful to erect, exhibit, fix, maintain, retain or continue any advertisement, whether existing at that date or not, upon any land, building or hoarding except on such sites, buildings or hoardings as the corporation may in writing license, and such licence may be granted for such period

not exceeding three years and under and subject to such terms and conditions to be therein prescribed as the corporation may deem proper.

The statute went on to provide a right of appeal by a person aggrieved by the refusal of the corporation to grant a licence under the provisions of the section. Sect. 29 (5) provides as follows :

Any person acting in contravention of any of the provisions of this section or of the terms and conditions of any licence under this section shall be liable to a penalty not exceeding £5 and to a daily penalty not exceeding 20s. A

Finally, in sect. 29 (8) sect. 290 of the 1921 Act was amended, sub-sects. (2) and (5) being repealed, and subsect. (4) being amended, with regard to the penalty under that statute, by leaving out the words "or who violates any conditions or the terms of any consent given in pursuance of the provisions of this section." B

The defendants in this case, Arthur Maiden, Ltd., are a commercial concern undertaking the business of advertising contractors in connection with advertisements of a kind which were described to me as "solus" advertisements. I rather gather that the principal part of the defendants' activities is the arrangement of advertisements on the eaves of houses. However that may be, they were persons who had been carrying on business for some time in the city of Liverpool, and they were persons who it was necessary for their own purposes should continue their business within the meaning of the words as used in sect. 29 (1) of the Act of 1930. They applied to the appropriate committee of the council of the Liverpool Corporation for licences in respect of a number of places in the city, and they succeeded in obtaining licences. So far as I know, there is no real distinction to be drawn between any of the licences as set out in the particulars which are annexed to the statement of claim in this action, and I see no useful purpose to be served by examining in any detail what those licences were. It will be sufficient if I set out the first one. The date of the application was Mar. 11, 1937, and the site of the advertisement was Breck Road. The date of the licence was Apr. 8, 1937, and the date of the expiration of the licence was Apr. 30, 1938, being therefore well within the period of three years mentioned in the subsection of sect. 29 to which I have referred. It appears that the Liverpool Corporation, acting, as I have said, by their appropriate committee, in the proper exercise of their discretion, and having taken into account, so far as it appears in this case, all relevant matters, decided that, upon the granting of licences of this sort, they would charge a fee to a person who was to obtain a licence or licences. Apparently it was not made a condition precedent to the grant of a licence that a fee would be charged, and it was not made a condition that, with the application, a fee should be paid, nor do I think it makes any difference in the view which I am ultimately going to express. What they did was to put into the form of licence, which was used in the vast number of cases with which I am concerned here, a term or condition No. 1, namely : "That a fee of — be paid to the city treasurer." I ignore the fact that, about Aug. 9, 1937, the language of that term or condition was changed so as C
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to read: "That an administration fee of — be paid to the city treasurer." Mr. Pritchard, who has represented the corporation before me, has, with his usual frankness, said that in his view the addition of the word "administration" makes no difference to the legal position. Therefore, I do not proceed to examine it further. However, the blank

A in that term or condition was ultimately filled in generally by the insertion of the sum of 10s. 6d., and in some instances the fee was £1 1s. The fee appears to have been raised to £1 1s. somewhere about May 7, 1937. The defendants took up the licences, and, I assume, have duly exhibited the "solus" advertisements on the sites referred to in those
B licences, and they have refused to pay the money, or at any rate the total of the money figures which have been inserted in the licences in the term or condition No. 1. It was in those circumstances that, on Jan. 19, 1938, the corporation, as plaintiffs, issued the writ in this action, in which they claim to be paid a total of £226 5s. 6d., being the amount of
C the so-called fees inserted in the licences.

For the corporation, it is said that "term or condition" is a perfectly general expression, and that one can as well say, "The term that I make is that you shall pay me 10s. 6d.," as, "The term that I make is that the advertisement, for example, shall not exceed a certain size," or some-
D thing of that sort. It is suggested that sect. 29 (1) is so wide in its terms as to give the corporation a full discretion, so long as they exercise discretion properly, and that, in accordance with the law, they have a discretion to impose whatever terms and conditions they deem proper. It is also said that, although this money term of 10s. 6d. is not mentioned
E in express language, nevertheless, the language of sect. 29 (1) is wide enough to include it.

On the other hand, the defendants say that the corporation have not exercised their power in accordance with law, so that in this sense they say that the corporation have no power to make any such demand, or
F any such term or condition. Mr. Lynskey, who appears for the defendants, in the course of a detailed and careful argument has submitted that the general position is that payments of this sort are, as a generality, payments which are demanded of the subject, and that, unless those payments are authorised in express language, they are not authorised
G payments. He has supported that argument by calling my attention to a number of statutes on licensing, and other statutes, where express terms or conditions are used, and where it is said, in addition, that express power to make demands, or to charge any money payment, is also included. Just for the purpose of my judgment, I indicate what those statutes
H were. There was the Gaming Act, 1845, s. 10, the Public Health Amendment Act, 1890, s. 51, dealing with music and dancing, the Cinematograph Act, 1909, s. 2, the Dangerous Drugs Act, 1920, s. 12, and the Licensing (Consolidation) Act, 1910, s. 92. I mention those as illustrations of Mr. Lynskey's wider list of illustrations, and of what he says is the general rule. He says that the special reason why these other statutes have

included this special provision is because it is no doubt quite clear that in a number of cases any sort of attempt to impose a financial burden upon the subject is not lawful in the absence of plain and clear language, unambiguous in its terms. He has referred me, for this purpose, to a passage in the judgment of SCRUTTON, L.J., in the Court of Appeal in *A.-G. v. Wilts United Dairies* (1). In the course of that judgment, A
SCRUTTON, L.J., said, at p. 885 :

It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the executive, but in my view the clearest words should be required before the courts hold that such an unusual delegation has taken place. As WILDE, C.J., said in *Gosling v. Veley* (2), at p. 407 : "The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the burthen, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it." Particularly where the sums to be paid to the Crown are to be paid as a condition of obtaining a licence to exercise the ordinary rights of a subject should the clearest words be required. In practice, C
legislation protecting certain acts except on licence usually state the pecuniary terms on which licences can be obtained.

That passage, which is to me of the highest authority, coming as it does from SCRUTTON, L.J., I regard as being composed of words to which I should pay the very greatest attention. It is interesting to observe that in the particular case, which was one in which the Food D
Controller had sought to make upon milk producers in a certain part of the country a charge of 2d. per gallon, under some regulations which he was making, the Solicitor-General, for the Crown, was asked, in the course of the argument, whether, in his view, knowing that the Food Controller required an expensive staff, he could provide the money for it E
by a regulation involving the payment of £1,000 or £100 for a licence to sell milk. The Solicitor-General of that day seems to have answered that he thought he could not, but the reason he gave for that view was that he thought that the condition would be too remote from the purposes of his appointment. I do not know whether that means because there F
was no express power for him to do so. Otherwise I am not quite sure that I follow what the Solicitor-General meant when he said "the condition would be too remote from the purposes of his appointment." *A.-G. v. Wilts United Dairies* (1) went to the House of Lords, where the judgment of the Court of Appeal was affirmed, and the opinion of G
LORD BUCKMASTER does not in the least impugn or reflect upon the judgment of SCRUTTON, L.J., in the Court of Appeal. LORD BUCKMASTER seems to have accepted the principle, because I observe that in his opinion he says that the only question was whether those powers were granted, and that there were only two possible sources from which H
the Food Controller could derive his powers—one was the words of the Act of Parliament by which he was appointed, and the other was the Defence of the Realm Regulations. Neither of these enactments enabled the Food Controller to levy any sum of money upon any of His Majesty's subjects, and, therefore, the principle seems to have been recognised in

the House of Lords. Indeed, it is difficult to see how any other view of it could have obtained, and, in view of the Solicitor-General's statement in that case, I do not think that it makes any difference whether, for the purposes of the present case, the Liverpool Corporation were seeking to do what the Food Controller was doing in that case, and take so much
 A from the milk producer under the licence which was being granted to him, or whether, as in this case, a fee was being charged for the obtaining of the licence.

Therefore, I approach the present case from this point of view. The simple point which I have got to decide is: "Have the Liverpool
 B Corporation obtained, by their Act of 1930, power to levy that which would not be a legal charge upon the subject?" I desire to point out once more, before I go on to examine in greater detail the Liverpool Corporation (General Powers) Act, 1930, that this is a section of the statute which deals with the position, and which is intended to cover the position, where the
 C proposed licensees were already in business, or at least covering the position where advertisements were already in existence at the date when that section was intended to come into force—namely, Jan. 1, 1934. On the other hand, of course, it is plain that that section intended that there should be some interference with those persons,
 D because they had to get a licence authorising them to continue their advertisements, just as persons in future would have to get a licence to put up an advertisement or advertisements. I do not want to lay too much emphasis upon Mr. Lynskey's comparison of other statutes, and the language used in other statutes, where the words "terms and conditions" apply, and where, in addition, express language has been
 E used permitting the charge. I give full weight to Mr. Pritchard's argument upon this point that, because the draughtsman, in the case of some statutes, thought it wiser to give the express power, it is no actual proof that, without the express power, the charging of a sum of money by way
 F of a fee for the licence would not be authorised. However, I am bound to say that those statutes, as cited to me by Mr. Lynskey, seem to bear out expressly what SCRUTTON, L.J., has said in his judgment, to which I have already referred. I will just read the passage again:

In practice, legislation protecting certain acts except on licence usually states the pecuniary terms on which licences can be obtained.
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I now come to look at the words "terms and conditions" in sect. 29 (1). I think that I have to construe the section as a whole, and the greatest difficulty which I feel in construing the section in the way in which Mr. Pritchard would like me to construe it is the presence of subsect. (5),
 H which provides as follows:

Any person acting in contravention of any of the provisions of this section or of the terms and conditions of any licence under this section shall be liable to a penalty not exceeding £5, and to a daily penalty not exceeding 20s.

If I were to construe those words "terms and conditions" as justifying a money payment, it would mean that it would produce the absurd

result, as it seems to me, under this section, that any person who did not make a money payment would be liable to pay a penalty not exceeding £5, and a daily penalty of 20s. This penalty would be a penalty for the non-payment of a sum of money which, broadly speaking, is quite contrary to the policy of our law. I am bound to confess that a construction which would enable that result to be arrived at strikes me as a very extraordinary construction. A

I am also impressed by the later section in the statute to which Mr. Pritchard has been good enough to refer me—namely, sect. 42—because that section expressly provides as follows :

All expenses incurred by the corporation in carrying into execution the provisions of this Act with respect to which no other provision is made shall be defrayed out of the general rate fund and the general rate. B

It is really noticeable, however, that in that section there is the statement : “ . . . to which no other provision is made . . . ” I have read and examined each of the other cases cited in argument by Mr. Pritchard, C really, I think, with the object of drawing the enemy’s fire in advance, and I had better mention them, so that it will be observed that I have not overlooked them. There are *Southwark Corpn. v. Partington Advertising Co.* (3), *Brocklebank, Ltd. v. R.* (4), and *Swansea Improvements & Tramways Co. v. Swansea & Mumbles Ry. Co., Ltd.* (5). With regard to those D cases, I deem it necessary to say a few words on the last only. In that case, there was a line of railway running from the town of Swansea to Mumbles, and the applicants were empowered to make a system of tramways in Swansea and form a junction with the line which belonged to the respondents. At the date of the Act, the respondents’ line was E worked by horse power, and at the date of the application the respondents used steam power. The question which was involved was whether the applicants’ running powers entitled them to use the respondents’ line with horse power. There was a provision in the Act that, if the running F powers were to be exercised, they were to be on terms to be agreed, or, in default of agreement, to be settled by arbitration. The owners of the railway were to make all arrangements required by agreeing to arbitration. All that was held was that, under the terms of that particular Act—namely, the Swansea Improvements and Tramways Act, 1874—the word “ terms ” included the necessary arrangements for adjusting the G position. I think that is no authority binding me to hold that the word “ terms ” in the Liverpool Corporation (General Powers) Act covers a money payment of the kind which it is now suggested I should uphold. I think that I must look and see what the purpose of the Swansea Improve- H ments and Tramways Act was. It was obviously intended to cover the case of two persons bargaining together about a purely commercial matter, and the word “ terms ” naturally and necessarily involved consideration of the business arrangements which had to be made in order to adjust the position of the owners of the line with that of the persons entitled to have running powers over it. In other words, I think that that was quite

a distinct case, and quite different from the present one, in the sense that, having regard to the application of the principles to which I have alluded, I find myself quite unable to come to the conclusion that there is an express power conferred by the Liverpool Corporation (General Powers) Act, 1930, s. 29, to make the charge which it is sought to make in the course of charging for these particular licences. I have considered whether, in those instances, it would have been possible to say that, inasmuch as the defendants have taken the benefit of the licences which they had granted to them, they were obliged to pay the sums which are conditional upon the granting and issuing of the licences, but I think the answer to it is that, unless they took the licences from the corporation, they could not carry on the business which they wanted to get, and the corporation would only give them licences which contained a term which, as I am about to hold, is one which they could not lawfully impose. In those circumstances, I do not think that this is one of those cases in which it can be said, within the meaning of a number of authorities to which I need not refer, that, as the defendants have taken advantage of the granting of the licences, they must, therefore, make the payment which is a term or condition of the grant.

The result of it all is that, for these reasons, I come to the conclusion, on the language of this section, that the corporation have not obtained a power enabling them to make the charges which they have sought to make. The result is that the action must be dismissed, with costs.

Action dismissed with costs.

Solicitors: *W. H. Baines*, Town Clerk, Liverpool (for the plaintiffs); *A. E. Tickle & Son* (for the defendants).

[*Reported by M. D. CHORLTON, Barrister-at-Law.*]

BATTY v. LEE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 20, 1938.**]

Poor Law—Idle and disorderly person—Running away and leaving wife and child whereby they became chargeable to public assistance committee—Maintenance order against accused made by another court already in existence—Whether charge sustainable—Vagrancy Act, 1824 (c. 83), s. 4.

The respondent was charged under the Vagrancy Act, 1824, with having unlawfully run away from a certain parish and left his wife and child, then under 16 years of age, whereby they became chargeable to the local public assistance committee. At the hearing of the charge, it was admitted that there was then in existence a maintenance order against the respondent made by another court of summary jurisdiction, at the instance of the wife of the respondent, under the Summary Jurisdiction (Married Women) Act, 1895, s. 5. The respondent contended that the mere existence of the maintenance order constituted a complete defence to the charge. The justice upheld the contention, declined to hear evidence tendered by the appellant, and dismissed the charge. Thereupon this appeal was brought:—

HELD: as the order made under the Summary Jurisdiction (Married

Women) Act, 1895, s. 5, did not free the husband from his legal obligation to maintain his wife and child, it was the duty of the court to hear and consider the evidence.

EDITORIAL NOTE. The existence of an order made under the Summary Jurisdiction (Married Women) Act does not prevent the local authority from proceeding against the husband in respect of an offence under the Vagrancy Act, 1824, s. 4, where the wife or children, or both wife and children, have become chargeable to the public assistance committee. Under that section, the husband may be punished as an idle and disorderly person. The authority may also proceed under the Poor Law Act, 1930, s. 19, for an order on the husband to pay a weekly sum towards the cost of the relief provided.

AS TO IDLE AND DISORDERLY PERSONS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 438-440, paras. 788, 789; and FOR CASES, see DIGEST, Vol. 37, pp. 358-360, Nos. 1608-1623.]

Cases referred to :

- (1) *Shaftesbury Union v. Brockway*, [1913] 1 K.B. 159; 37 Digest 359, 1614; 82 L.J.K.B. 222; 108 L.T. 336.
- (2) *Birmingham Union v. Timmins*, [1918] 2 K.B. 189, 37 Digest 234, 261; 87 L.J.K.B. 1096; 119 L.T. 146.

APPEAL by way of case stated from a decision of one of the justices for the West Riding of Yorkshire petty sessional division of Upper Osgold-cross, sitting at Pontefract.

Clive W. Salter for the appellant.

The respondent was not represented.

LORD HEWART, L.C.J. : This is a case stated by a court of summary jurisdiction in the West Riding of Yorkshire, and the question which it involves arises in the following way. At a court sitting at Pontefract, an information was preferred by the appellant under the Vagrancy Act, 1824, against the present respondent for that he unlawfully did run away from the parish of Hemsworth and unlawfully did leave Elizabeth, his wife, and Margaret, his child, then under the age of 16 years, whereby they became chargeable to the West Riding Public Assistance Committee on Aug. 19, 1936. The justice who heard that information dismissed it, and the question—and the only question—for us is whether in so doing he came to a correct determination or decision in point of law.

It appears that, when the information was being considered, it was admitted before the justice that there was then in existence a maintenance order against the respondent made by another court of summary jurisdiction at the instance of the respondent's wife, under the Summary Jurisdiction (Married Women) Act, 1895, and it was contended that the mere existence of that maintenance order constituted a complete defence to the charge under the Vagrancy Act, 1824, s. 4. On the part of the appellant, on the other hand, it was contended that the existence of the maintenance order was in no way inconsistent with the commission of an offence under sect. 4. The magistrate came to the conclusion that the existence of the maintenance order constituted a complete defence

to the charge under sect. 4. He declined to hear evidence tendered by the appellant, and dismissed the information.

In my opinion, the magistrate in so deciding came to a wrong conclusion in point of law. The matter is, I think, concluded by *Shaftesbury Union v. Brockway* (1), where the matter is put with perfect clearness by A PICKFORD, J., in a short judgment. He was dealing there with a slightly different, but not essentially different, matter, and he said, at p. 164 :

The order made under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, does not free the husband from his legal obligation to maintain his children. It might be said that the 7s. 6d. a week ordered to be paid by the respondent to his wife was for the maintenance of his wife and children, and if he had obeyed that order and paid the weekly sum to his wife he might perhaps have had a defence against the charge of wilfully refusing and neglecting to maintain his two children. But inasmuch as he has not obeyed the order, that defence is not available to him. Upon the facts here he has wilfully refused and neglected to maintain his two children whom he is legally bound to maintain, and that obligation is not affected by the order made under sect. 5 of the Act of 1895.

Our attention has also been directed to the analogous case of *Birmingham Union v. Timmins* (2). In my opinion, therefore, it was the duty of the court of summary jurisdiction not to decline to hear the evidence tendered by the appellant, but, on the contrary, to hear and consider it. I think that the case should go back, in order that that course may be D taken.

CHARLES, J. : I agree.

HUMPHREYS, J. : I agree.

Appeal allowed and case remitted back to be heard and determined.

E Solicitors : *Warwick Williams & Marchants*, agents for *Sir Charles McGrath*, County Solicitor, Wakefield (for the appellant).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

F *Re* CARTWRIGHT, CARTWRIGHT v. SMITH.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
November 1, 2, 1938.]

G *Settlements—Proceeds of sale of settled land—Whether realty or personalty—Settled Land Act, 1925 (c. 18), s. 75 (5).*

Wills—Will made abroad—Proceeds of sale of settled land—Whether personalty—Wills Act, 1861 (c. 114), s. 1.

H The testator effected a settlement of real property on his marriage in 1906, but most of the trusts of that settlement failed by reason of there being no issue of the marriage. The only subsisting trusts at any material time were for the payment of certain annuities and rentcharges and the ultimate trust which was in favour of the right heirs of the testator. During the lifetime of the testator, the real property was sold and the proceeds invested. During the latter years of his life, the testator, without relinquishing his English domicile, resided in France, and there executed three holograph wills, which were admitted to probate in England. By the Wills Act, 1861, s. 1, these wills would be valid to pass personalty but not realty situate in England. The question

was, therefore, whether the investments representing the proceeds of sale of the settled land were realty or personalty, and the Settled Land Act, 1925, s. 75 (5), was relied upon to show that they were realty:—

HELD: these investments were realty, and were not, therefore, capable of being disposed of by a will admitted to probate under the Wills Act, 1861, s. 1.

Decision of BENNETT, J. ([1938] 3 All E.R. 391) reversed.

[EDITORIAL NOTE.] BENNETT, J., based his decision in this case upon the argument that the law relating to devolution for the purposes of the present case had been altered by the enactment of the Administration of Estates Act, 1925. The Court of Appeal have, however, pointed out that the provisions of the Act are concerned only with devolution upon intestacy, and are of no effect in the circumstances of the present case. The meaning of the word "land" in the Settled Land Act, 1925, s. 75 (5), is also discussed, and it is pointed out that, in considering the nature of the property in the present case, its nature in the hands of the testator before the operation upon it of the clauses of the will in question must be considered, and not its nature after the operation of those clauses.

AS TO LORD KINGSDOWN'S ACT, see HALSBURY, Hailsham Edn., Vol. 6, p. 249, para. 302; and FOR CASES, see DIGEST, Vol. 11, pp. 371, 372, Nos. 506-520.]

Cases referred to:

- (1) *Shelley's Case, Wolfe v. Shelley* (1581), 1 Co. Rep. 93; 44 Digest 922, 7798.
- (2) *Re Lyne's Settlement Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80; 20 Digest 378, 1152; 88 L.J.Ch. 1; 120 L.T. 81.
- (3) *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416; Digest Supp.; 91 L.J.Ch. 289; 126 L.T. 460.
- (4) *Re Twopeny's Settlement, Monro v. Twopeny*, [1924] 1 Ch. 522; 20 Digest 341, 327; 93 L.J.Ch. 323; 130 L.T. 816.
- (5) *Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268; Digest Supp.; 99 L.J.Ch. 177; 142 L.T. 111.
- (6) *Chandler v. Pocock* (1881), 16 Ch.D. 648; 20 Digest 371, 1095; 50 L.J.Ch. 380; 44 L.T. 115.

APPEAL from a judgment of BENNETT, J., reported [1938] 3 All E.R. 391. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

W. C. Cleveland-Stevens, K.C., and *C. V. Rawlence* for the appellants, Charles Henry Aubrey Cartwright and William Aubrey Cartwright, parties interested under the will of 1914.

Lionel L. Cohen, K.C., and *T. A. C. Burgess* for the respondent, Mrs. Sophia Frances Cartwright, the party interested under the will of 1934.

P. H. L. Brough for Vivian Hugh Smith, the trustee.

Cleveland-Stevens, K.C.: The Settled Land Act, 1925, s. 75 (5), operates to convert the securities, in which the moneys were invested, into freehold land. The result of such conversion is that the beneficial nature of the settlement would be freehold land, and not personalty, and it would not pass under a will admitted to probate by virtue of Lord Kingsdown's Act. Except for the Administration of Estates Act, 1925, and *Re Twopeny's Settlement, Monro v. Twopeny* (4), it would have been held by BENNETT, J., that sect. 75 (5) did effect an equitable conversion, in which case the securities would have to be treated as land. As regards the statement made by BENNETT, J., that sect. 75 (5) has been rendered inoperative, my submission is that it is highly unlikely that the legis-

lature would have brought into being at the same time two Acts one of which entirely destroys the provisions which have been made by the other, or that the legislature would have done away with the doctrine of conversion except by the use of the clearest language. Except in the case of intestacy, the distinction between realty and personalty is as valid as ever it was. *Re Kempthorne, Charles v. Kempthorne* (5) shows that sect. 75 (5) has the same operation to-day as it always has had, notwithstanding anything in the Administration of Estates Act, 1925.

Cohen, K.C. : The Settled Land Act, 1925, s. 75 (5), on its true construction, only effects a conversion for the purpose of devolution under a settlement, and it has no bearing on a case where the testator acquires his interest before the settlement. The two parts of subsect. (5) cannot be taken and separated. They must be read as a whole, and, when so read, they are confined to conversion for the purpose of the settlement. That is what the Court of Appeal was dealing with in *Re Twopeny's Settlement, Monro v. Twopeny* (4). So far as devolution under the settlement is concerned, the subsection provides that the money shall be held for the same persons and purposes as the land under the settlement. The consequence is that, when the court is dealing with a disposition before the settlement of an interest acquired under the settlement, the court is not bound by sect. 75 (5). The terms under which these trust funds are held are defined by sect. 73, and those trusts are not an imperative direction to invest in land. There is no one who can compel investment in land, except perhaps the tenant for life. Sect. 75 (5) does not operate to effect a conversion, except for the limited purpose of devolution under the settlement. In the present case, there is a disposition before the settlement, and there is no imperative direction to invest in land. Therefore the fund must be taken as it is found. It is found as personal estate, and therefore Lord Kingsdown's Act is applicable. Assuming that there was a conversion under sect. 75 (5), Mr. Cartwright was entitled to take the property in the form in which he found it. In 1914, he made a will in which he re-settled it as land. In 1915, he sold the property, and did not direct the trustees to re-invest the proceeds in land, although he could have done so. As soon as the incumbrances had been paid off, with the consent of the trustees, he took as much of the investments as he could. There was no possibility of there being children. On the facts, he intended to take, and to deal with, the property as personalty. Under Lord Kingsdown's Act, the validity of the will is limited to personal estate, and the point, with regard to all the facts of the case, is whether this fund, which consisted of movables, is deemed to be movables, or whether, by reason of sect. 75 (5), it must be considered as real estate. Lord Kingsdown's Act, being an enabling Act, should be given a beneficial construction, and nothing should be excluded but real estate. Assuming against me that a conversion is effected, by reason of sect. 75 (5) it is competent for a person to elect to take the estate in the form in which it is, and, if he does so, it is not converted. *Re Sturt, De*

Bunsen v. Hardinge (3) establishes that the mere existence of an annuity charged upon the property does not prevent a re-conversion, provided that the consent of the person entitled to the annuity is obtained. That consent can either be proved or be inferred from the circumstances. Sect. 75 (5) has not amended Lord Kingsdown's Act, although there may have been a modification of the doctrine of conversion. It may be that, by the change in the law, the beneficial ambit of Lord Kingsdown's Act has been enlarged. For the reasons given by BENNETT, J., his decision was right. Sect. 75 (5) does not operate to convert the proceeds of the sale of settled land into real estate. The conversion is into "land," which, by the definition in the Act, includes leaseholds. There is a well-recognised difference between land and real estate. The contrast, in Lord Kingsdown's Act, is between real estate and personal estate. Lord Kingsdown's Act is not affected by sect. 75 (5), because of the distinction between land and real estate. [Counsel referred to *Chandler v. Pocock* (6) and *Re Lyne's Settlement Trusts*, *Re Gibbs*, *Lyne v. Gibbs* (2).]

SIR WILFRID GREENE, M.R. : This is an appeal from a judgment of BENNETT, J., on an originating summons which raised several questions, the first being a question as to the operation of Lord Kingsdown's Act in the circumstances of the case. In view of the decision of BENNETT, J., the other questions did not arise, and accordingly they have not been discussed in any way before us. As this appeal is allowed, the summons will have to go back to BENNETT, J., to be dealt with on the basis of our decision.

The facts are not at all complicated. On June 25, 1906, there was executed the marriage settlement of Mr. Aubrey Ralph Thomas Cartwright to Mrs. Sophia Frances Trotter, who was a widow. Under that settlement, certain freehold estates were settled to uses under which the settlor, the husband, was entitled to an estate in fee simple by virtue of the rule in *Shelley's Case*, *Wolfe v. Shelley* (1), but that estate in fee simple was liable to be divested in the event of there being issue of the marriage. In other words, the limitations, putting them quite shortly, were to the use of the husband for life, with remainder to the use of the heirs of his body in succession in tail, and an ultimate remainder to the husband himself. The settlement also created certain charges upon the land, the only charge actually subsisting at the date of the settlor's death being a charge of two annuities in favour of his widow. There was a pre-existing charge in favour of his aunts on part of the settled land. The settlor, the husband, died on June 13, 1936, leaving his widow, the present plaintiff, but no issue, surviving him. There never was any issue of the marriage. He left brothers, of whom the defendant, Charles Henry Aubrey Cartwright, is the oldest, and he has an infant son, the infant defendant, William Aubrey Cartwright. They are parties as being interested under an English will which the settlor made in 1914. That was a will under which he dealt with his interest in the real estate

which was settled by the marriage settlement. It has not yet been proved, for reasons which will appear. As I have said, he made a will in 1914, at a time when the land remained unsold, but, between 1915 and Jan., 1935, the settlor, in exercise of his powers as tenant for life, sold the whole of the settled land, and, when he died, the settled estates were

- A** entirely represented by investments. In view of the circumstance that there was believed to be no possibility of issue, in which event the settlor would become absolutely entitled subject only to the charges I have mentioned, a considerable portion of the investments which had been made of the proceeds of sale was handed over to the settlor in his lifetime.
- B** There were retained in the hands of the trustee sufficient investments to meet the subsisting charges on the settled property, and it is with regard to those investments that the present question arises.

In the latter years of his life, the settlor apparently lived in France, although he does not appear to have lost his English domicile. While in

- C** France, he made three wills, which satisfied the laws of France as to the forms of wills and as to the manner of their execution, but which did not satisfy the Wills Act. The first of those wills is dated Jan. 2, 1926, and under it he revokes his previous will and leaves all his furniture and effects to his wife "with power of disposal as she may wish, absolutely
- D** nothing to my other brothers and sister." The second will, dated Nov. 1, 1933, provided for the event of his surviving his wife, which did not happen. The last will, dated Nov. 22, 1934, begins by saying: "I wish on my death to leave everything to my wife." I need not refer to the other provisions of the will. Those wills, not being executed in accordance
- E** with the Wills Act, can, in the circumstances, acquire validity only by reason of the provisions of Lord Kingsdown's Act. Lord Kingsdown's Act (the Wills Act, 1861) provides, by sect. 1, as follows:

Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

- G** As I have said, these wills were made according to forms required by the law of the place where they were made—namely, France—and, therefore, by virtue of that section, the wills are well executed for the purposes of being admitted to probate, but only so far as regards personal estate. Therefore the question which arises and which falls to us for decision
- H** is whether or not the settlor's interest in the investments, which at the date of the settlor's death were in the hands of the trustee and represented proceeds of sale of the real estate, ought to be regarded, for the purposes of Lord Kingsdown's Act, as personal estate? BENNETT, J., held that the settlor's interest in the investments in question was, for the purposes of Lord Kingsdown's Act, personal estate, upon the ground

that the Administration of Estates Act, 1925, has struck at the whole foundation of the doctrine of conversion in such a case as the present. That decision I shall deal with in due course. It was a decision on the point which, as I understand, was not argued before BENNETT, J., and I shall therefore first deal with the matter apart from that point. *Prima facie*, one would have thought, approaching this matter without too much research or reflection, that money, which represents the proceeds of sale of settled real estate, ought in law, having regard to the relevant provisions of the Settled Land Act, to be regarded as real estate, and that, being so regarded, property of that character should not be regarded as personal estate within the true meaning of Lord Kingsdown's Act. It is said that that is not so, and, apart from the reasons on which BENNETT, J., decided the case, three points were taken by Mr. Cohen.

I will take the last point first, because it appears to me to come logically first. It was to this effect, that the relevant provisions of the Settled Land Act, which deal with what I may be permitted to call the status of the proceeds of sale of settled land, do not operate to convert those proceeds into real estate at all. If that view were correct, the interest of the settlor in the investments in question would have been, in the eye of the law, personal estate, and, therefore, Lord Kingsdown's Act would have had the result of making the will a good will with regard to it for the purposes stated in the Act. I must confess that, when that argument was put forward, it struck me as being a revolutionary one, and as one which destroyed a view which had, rightly or wrongly, impressed itself for many years on one's mind. The section of the Settled Land Act, 1925, which is the only one to which I need refer—I need not go back to the Act of 1882—is sect. 75 (5), and it provides as follows :

Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

That is a provision the object of which would strike the mind, I think, as being intended to produce the same result in every respect as though capital moneys coming into existence through the exercise of the statutory power retained the character of the land from which they had been derived. As CLAUSON, L.J., pointed out in the course of the argument, the practice of inserting in settlements trusts for re-investment in land of capital money arising under powers of sale in the settlement was a common one. Certainly, speaking for myself, I have always understood and thought that the object of this section was similarly the object of preserving the legal character of settled land, notwithstanding its conversion into capital money. There are obvious reasons why the legislature should have so provided, if injustice was to be avoided. Therefore I am of opinion that the effect of this provision is the same as it would have been, at any rate for the purposes of the present question, if there had

been an express trust for investment in real estate. That conclusion is, I think, one which, even if I were not disposed to come to it myself, I should be compelled to adopt in view of the decision of this court in *Re Lyne's Settlement Trusts*, *Re Gibbs*, *Lyne v. Gibbs* (2), at p. 97. Mr. Lionel Cohen made a courageous effort to avoid that conclusion by laying emphasis upon the word "land" in the subsection, for, as I have said, the subsection provides "capital money . . . shall for all purposes . . . be treated as land," and "land," he says, includes leaseholds. Then he says: "What right, therefore, have we to say that this capital money is to be treated as real estate when the section provides that it is to be treated as land which would include leaseholds?" It seems to me, with all respect to that argument, that the word "land" must be construed and given effect to in relation to the particular facts of this case, and, where you are dealing with a settled freehold which is sold, the capital money would be treated as freehold, and, where you have a settled leasehold which is sold, the capital money would be treated as leasehold, and so forth. It seems to me that there is no real difficulty in the construction of the subsection. That argument, therefore, in my opinion, fails.

The next argument is the one which came first in order of time—namely, that the Settled Land Act, 1925, s. 75 (5), only effects conversion for the purposes of disposition, transmission and devolution under the settlement itself, and does not operate to affect the nature of capital money and its disposition, transmission and devolution for any purpose outside the settlement. I have some difficulty in following the logic of that argument, in the circumstances of this case. At the date when the settlor died, there was in existence property which, for the purposes of this argument, is to be assumed to have been at that moment in the eye of the law real estate. The question is: Is that property personal estate for the purpose of Lord Kingsdown's Act? If, in the eye of the law, it was at that moment real estate, the answer is in the negative. I cannot see how there is any room for a suggestion that in some way or another what we are dealing with here is something outside the four corners of the settlement altogether. If you have something which had got out of the settlement, so to speak, there is nothing left upon which subsect. (5) can operate, but, when you look at the critical moment—namely, the moment of death—and ascertain what was the nature of the property at that moment, it seems to me that the answer is quite clear.

The next argument, which was, I think, the one on which most reliance was placed, was to this effect. It was said that, upon the facts of the case, and having regard to the limitations in the settlement, the settlor at the date of his death was absolutely and indefeasibly entitled to the settled property, subject to the annuities charged in favour of his widow, and subject also to the rentcharge which belonged to his aunts and was charged on the land under an earlier document. Some question was raised as to whether the marriage settlement did not charge that rent-

charge, which had previously been charged on part only of the settled land, upon the entirety of the settled land. That is a question into which it does not seem to be necessary to go. One reason why it was said he was indefeasibly entitled was this. It was said that, at the date of his death, there was no possibility of issue of the marriage, and, on the basis of there being no issue, he was, of course, entitled indefeasibly, under the rule in *Shelley's Case* (1), to an estate in fee simple. I am going to assume in Mr. Lionel Cohen's favour two matters as to which it must not be thought for one moment that I am satisfied. The first matter is that, on the facts, there is evidence, or sufficient evidence, from which the court ought to draw the conclusion that there was no possibility of issue at that time. On the evidence, I should have thought that that had not been established, but I will assume, for the purpose of testing the argument, that it was so. The other matter which I will, for the purpose of argument, assume in Mr. Lionel Cohen's favour is that, for the purpose of the doctrine which I am about to examine, a person who at his death has an estate in fee simple, subject to its being defeated by the birth of issue to himself, must be treated, nevertheless, as being indefeasibly entitled if it is shown that his surviving widow cannot have issue of the marriage. Obviously, if there was possibility of issue, it could not be said of the husband at the moment of his death that he was *dominus* of the settled funds, because in due course there might be born issue which would defeat his estate. However, I will assume, without expressing any opinion upon it, that Mr. Lionel Cohen would be right in such a proposition. Then he says this: Let it be granted that, under the relevant provision of the Settled Land Act, these investments were, in the eye of the law, real estate. It is always competent to a person absolutely entitled to property, subject to a trust for conversion, to elect to take that property in its unconverted state. No difficulty arises in the case of a person absolutely entitled. Quite clearly, he can so elect, and whether or not he has elected may be a question in any individual case, but his ability and capacity to elect are beyond question. However, it is a very different matter when you come to a person who is not absolutely entitled. In the present case, if the points which, for the sake of argument, I have assumed in Mr. Cohen's favour were decided against him, the result quite clearly would be that at his death the settlor was not absolutely entitled to these proceeds of sale, and, on that basis, he would not, in my opinion, have been entitled to elect to retain the proceeds of sale in their then condition, and thus put an end to the statutory direction to convert. The reason why he could not do so would be that there were other persons interested under the settlement in the execution of that trust. The matter is discussed with great lucidity in the judgment of PETERSON, J., in *Re Sturt, De Bunsen v. Hardinge* (3). I do not think that it is necessary to cite anything from that decision. The matter is succinctly stated in JARMAN ON WILLS, 7th Edn., Vol. 2, p. 745. Before I read that short passage, I wish to refer to one other point which comes

into this argument, and it is this. It is said by Mr. Lionel Cohen that a person who is at his death contingently entitled may indicate his intention that the trust for conversion shall come to an end in the event of that contingency being fulfilled. It is really in connection with that argument that I wish to read the passage from JARMAN ON WILLS. He says :

A But if the whole of the proceeds are given to A. on a contingency, and on failure of that contingency to others, the primary donee may, pending the contingency, declare his intention to keep the land unsold, so as upon the happening of the contingency before his death to re-convert the land, if no sale has been (as, of course, it may nevertheless have been) previously made.

B In the present case, making the assumptions which I have mentioned in Mr. Cohen's favour, it is necessary to examine what the alleged acts are which are said to indicate an intention on the part of the settlor to effect a reconversion. If those facts are insufficient for the purpose, the argument must necessarily fail, and it becomes unnecessary to examine the correctness of the other propositions on which the argument rests.

C The facts relied upon for producing that result are simply these : (i) that the settlor had been party to the transaction under which the rest of the settled funds had been handed over to him, leaving only the portion now in question in the hands of the trustee, (ii) that he did not require, as he could have done, that the funds should be invested in land,

D and (iii) that he made the French wills using the language to which I have referred. Those considerations appear to me to be quite insufficient to produce the result desired. The fact that he dealt with the part of the settled property, which was assumed to be free, in the way he did, appears to me to throw no light whatsoever on any intention on his part with

E regard to the part that was not regarded as free. The fact that he did not direct the investment in land is entirely colourless. The fact that he used in his French will certain expressions which, as a matter of language, would appear to show an intention to deal with everything that he owned cannot, in my view, operate so as to produce a reconversion, or

F to put an end to the statutory obligation to convert, whichever way one regards it, and for this reason. The question whether or not language used in a will is sufficient to indicate an intention on the part of a person (assumed otherwise to be competent) to effect a reconversion is, of course, a question of the true construction of that will, but, in the present case,

G there is a further factor in the situation, and that is Lord Kingsdown's Act. The question is : What is the meaning of "personal estate" in sect. 1 of Lord Kingsdown's Act ? Must the estate be personal estate, apart from, and independent of, anything in the will itself ? Must it, so to speak, pre-exist and be personal estate without reference to the will ?

H Or do the words in sect. 1 include something which, by reason of the very will itself to which it is sought to apply Lord Kingsdown's Act, acquires the character of personal estate ? The latter contention is what the argument implies, in so far as it relies on the directions in the will. It says : This is personal estate for the purpose of Lord Kingsdown's Act, and the reason why it is personal estate for the purpose of Lord

Kingsdown's Act is that the settlor, being competent to do so, has in the will itself expressed the intention that personal estate it shall be. That seems to me to be entirely illegitimate, because, before a thing can become personal estate, the will must be valid for the purpose of dealing with that personal estate under Lord Kingsdown's Act, and you cannot acquire, by virtue of the very will you are seeking to validate under that Act, the quality of personal estate which the Act requires before the will can be valid. The argument appears to me to fail, when that point is remembered. Quite apart from that consideration, however, and looking altogether at the various matters relied upon as indicating an intention to effect a reconversion, I am quite unable to take the view that the facts relied upon are sufficient. A

The last matter is the point on which BENNETT, J., decided the case. Shortly, it was that, as the result of the alteration in the law relating to devolution on intestacy which was made by the Administration of Estates Act, 1925, the distinction between real and personal estate, for present purposes, must be treated as having ceased to exist. It seems to me, with all respect to BENNETT, J., that he was under a misapprehension as to the effect of the Administration of Estates Act. That Act did not provide that thenceforward real property and personal property were to be the same, or that real property was not to exist, or something of that sort. It did not provide anything of the kind. All that it provided was that property which, under the previous law, had gone to one particular class of persons should thenceforward go to a different class of persons on an intestacy, and to argue from that that there is no room for the application of the doctrine of conversion in a case such as the present appears to me, with all respect to BENNETT, J., quite illegitimate. In the result, the appeal must be allowed. B

SCOTT, L.J. : I agree with the judgment that has been delivered.

CLAUSON, L.J. : I agree with the judgment delivered. C

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors : *Petch & Co.* (for the appellants) ; *Pennington & Son* (for the respondent and for the trustee). D

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.] E

Re BATE, PUBLIC TRUSTEE v. BATE.

[CHANCERY DIVISION (Farwell, J.), **November 2, 1938.**]

Wills—Construction—Clause negating apportionment—Exclusion of rule in Howe v. Dartmouth (Earl)—Whether provisions of Apportionment Act, 1870, also excluded—Apportionment Act, 1870 (c. 35), s. 7. F

A testator gave all his property to his trustee upon trust for sale with power to postpone the sale thereof "and to retain any investments subsisting at my death whether of the kind hereinafter authorised or not so long as he shall think proper and this notwithstanding that the

property affected may be of a leasehold tenure or otherwise of a perishable or wasting or wearing out nature and in particular my trustee shall not sell my securities in concerns in North or South America within three years of my death unless of opinion that any further recovery of price of any such security during such period is unlikely." Then followed the following clause negating apportionment: "the net profits and income received after my death from time to time of any unconverted property whatever its nature shall be applied without apportionment as if the same were income accruing after my death from the proceeds of the conversion thereof." The question was whether the latter clause merely excluded the application of the rule in *Howe v. Dartmouth (Earl)* (1) or whether it also excluded the application of the Apportionment Act, 1870:

HELD: the clause was appropriate to exclude the rule in *Howe v. Dartmouth (Earl)* (1) only, and the provisions of the Apportionment Act, 1870, must be applied.

[EDITORIAL NOTE. The application of the provisions of the Apportionment Act can only be excluded by express words, and it is held that the words of the clause here have reference only to the rule in *Howe v. Dartmouth (Earl)* (1), and cannot be construed as an express exclusion of the provisions of the Act of 1870.

AS TO NEGATING APPORTIONMENT, see HALSBURY, Hailsham Edn., Vol. 29, pp. 653-655, paras. 935-939; and FOR CASES, see DIGEST, Vol. 40, pp. 677-680, Nos. 2132-2157.]

Case referred to:

(1) *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury* (1802), 7 Ves. 137; 44 Digest 197, 265.

ADJOURNED SUMMONS asking for the determination by the court of the question whether, upon the true construction of the will, the dividends, income and profits from property forming part of the testator's estate received by the plaintiff after the death of the testator but declared in respect of periods wholly or partially antecedent to his death are apportionable under the Apportionment Act, 1870, or are wholly applicable as income of the residuary trust funds mentioned in the will.

H. H. King for the plaintiff.

Hubert A. Rose for the first defendant, interested in residue.

E. J. Heckscher for the two grandsons of the testator.

W. J. C. Tonge for the two granddaughters of the testator.

FARWELL, J.: The first question that I have to decide in this case is whether or not the Apportionment Act, 1870, applies. The question arises upon the will of Thomas Elwood Lindesay Bate. The will is dated Oct. 29, 1934. There is a codicil to the will, but it is irrelevant to anything I have to determine. The testator died on Dec. 3, 1937. He appointed the Public Trustee to be the executor and trustee of the will, and gave certain legacies to which I need not refer. The will then says:

I devise and bequeath to my trustee all my real and personal estate not hereby otherwise disposed of including all property over which I shall have any general power of disposition by will or codicil in trust to sell or otherwise convert into money my realty (including chattels real) and my personalty not being money. My trustee shall nevertheless have power to postpone such conversion and to retain any investments subsisting at my death whether of the kind hereinafter authorised or not so long as he shall think proper and this notwithstanding that the property affected

may be of leasehold tenure or otherwise of a perishable or wasting or wearing out nature and in particular my trustee shall not sell my securities in concerns in North or South America within three years of my death unless of opinion that any further recovery of price of any such security during such period is unlikely.

Then follows the clause which gives rise to the question I have to determine :

The net profits and income received after my death from time to time of any unconverted property whatever its nature shall be applied without apportionment as if the same were of income accruing after my death from the proceeds of the conversion thereof.

Then the testator provides for the payment by the trustee of his funeral and testamentary expenses and debts and legacies, and he directs the trustee to stand possessed of the residue upon trust to pay out of the income annual sums to which I need not refer and, subject thereto, to hold the income of the residuary trust funds upon protective trusts for the benefit of the son of the deceased during his life :

... and from and after the death of my said son subject to the payment to his widow if she shall survive him of an annual sum not exceeding £150 during her widowhood if my said son shall so appoint by will my trustee shall divide the capital of the residuary trust funds into four equal parts and shall hold the income of one of such parts on protective trusts for each of my son's four children for their respective lives.

After a provision to which I need not refer, the will provides :

From and after the death of any one of my said four grandchildren whether before or after my death my trustees shall hold the capital and income of the fourth part of the capital of the residuary trust funds the income of which was or would have been payable to such grandchild in trust for the only child or all the children equally of such grandchild who survive me and being male attain the age of 21 years or being female attain that age or marry.

The question which I am considering at the moment depends upon this. Does this will operate to exclude the provisions of the Apportionment Act, 1870, or is the provision which is contained in cl. 4 (b) only intended to provide that what is commonly known as the rule in *Howe v. Dartmouth (Earl)* (1) shall not apply in this particular case ? The Apportionment Act, 1870, s. 2, provides as follows :

From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Then sect. 7 of the Act provides as follows :

The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place.

That being so, there must be an apportionment in the present case unless I can say that the effect of cl. 4 (b) is to stipulate that the operation of the Act is to be excluded. I have been told by Mr. Rose that I am compelled by the language of the testator to hold that there is an exclusion. So far from that being the case, I think that the other view is the true construction of the will. I think that the intention of the testator was only to exclude the operation of the rule in *Howe v. Dartmouth*

(Earl) (1). It was not intended to exclude the application of the Apportionment Act. The testator did intend that the rule in *Howe v. Dartmouth* (Earl) (1) should not apply. The language he has used is "the net profits and income received after my death." The language relates to the rule in *Howe v. Dartmouth* (Earl) (1). He says "shall be applied without apportionment as if the same were income accruing after my death from the proceeds of the conversion thereof." That is to say, the whole of the income accruing after his death is to be treated as if it had been converted and invested in trustee securities. Therefore, such part of the income as, under the rule, ought to be treated as capital is to be treated as income. The whole is to be treated as income, whether the property has been converted or not, without any apportionment as between capital and income. It seems to me to be quite clear from the language that the testator has used that the testator has made no express declaration, and, unless it is quite plain upon the language of the will that he intended to exclude the Apportionment Act, the Act must be applied, and I make a declaration accordingly.

Solicitors: *Stibbard, Gibson & Co.* (for all parties).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

ELECTRIC & MUSICAL INDUSTRIES, LTD. v. LISSEN, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), **May 2, 3, 5, 6, 9, 10, 12, 13, 16, 17, 19, 20, 23, 24, 26, 27, 30, 31, June 2, 14, 16, November 3, 1938.**]

Patents — Infringement — Specification — Construction — Disconformity — Legitimate development—Patents and Designs Acts, 1907-1932, ss. 25 (2), 91.

Claim 1 of a patent was as follows: "In an amplifier circuit including an electric discharge tube wherein alternating current energy is relayed through the control action of a grid electrode upon an electron current in the vacuous space of the tube, the method of adjusting the transmission through said amplifier which comprises the steps of controlling by different amounts the portions of said electron stream flowing through different regions of said vacuous space by a special design of the tube electrodes, impressing upon said control grid a steady polarising voltage and adjusting said polarising voltage to a value substantially different from that at which the total electron current falls to zero." Claim 2 and succeeding claims covered other aspects of the invention described in claim 1. The question was whether this claim was a claim in respect of the use of the valve for amplification or a claim for a method of using the valve according to the strength of the signals to be received. If the former was the proper construction, a similar valve had been previously published in prior specifications, though it was intended to be used for quite a different purpose and the claim was therefore lacking in subject-matter. The original patent in the present case had been granted in the United States of America, and it was alleged that there was disconformity between the English and American claims:—

HELD (LORD ATKIN and LORD PORTER dissenting): (i) the claim, upon its true construction, was merely a claim for the use of the valve for amplification, and was invalid for anticipation.

(ii) upon the facts, there was disconformity between the English and American claims.

(iii) (*per* LORD ATKIN, LORD RUSSELL OF KILLOWEN dissenting) the words in the grant of the patent "shall be construed in the most beneficial sense for the advantage of the said patentee" are not a mere conventional form of royal graciousness, but enforce a liberal construction in favour of the patentee.

(iv) (*per* LORD WRIGHT) upon a question of disconformity, the doctrine of legitimate development cannot be invoked, and the grant must be confined to the claim for which protection was applied for in a foreign application. A

(v) (*per* LORD RUSSELL OF KILLOWEN and LORD WRIGHT). The monopoly claimed must be stated clearly and precisely in the claims. It is not permissible to change a claim which by its own language is a claim for one subject-matter into a claim for another subject-matter by means of a reference to some language used in the body of the specification. B

[EDITORIAL NOTE.] So far as the claim is concerned, the question is purely one of construction, and the difficulties thereof are sufficiently shown by the differences of judicial opinion. LORD WRIGHT deals only with the question of disconformity, and with reference to this matter his opinion herein is of the highest importance. There is also to be noted the difference in the views of LORD ATKIN and LORD RUSSELL OF KILLOWEN concerning the concluding words of the grant of letters patent, which provide that the patent shall be construed in the sense most beneficial to the patentee. Since this case was heard, the Patents, etc. (International Conventions) Act, 1938, has been brought into operation. By sect. 5 of that Act a new subsection (2B) has been added to sect. 91 of the Patents and Designs Act, and it is now provided that in determining whether an invention described or claimed in a United Kingdom specification is the same as that for which protection has been applied for in a convention country, regard shall be had to the disclosure contained in the whole of the documents put forward at the same time as, and in support of, the application in the convention country, being documents of which copies have been left at the Patent Office within such time and in such manner as may be prescribed. C

AS TO CONSTRUCTION OF SPECIFICATION, see HALSBURY, *Hailsham Edn.*, Vol. 24, pp. 639-647, paras. 1201-1216; and FOR CASES, see DIGEST, Vol. 36, pp. 638-643, Nos. 1079-1133.] D

Cases referred to : E

- (1) *Dudgeon v. Thomson* (1877), 3 App. Cas. 34; 36 Digest 769, 2483. F
- (2) *Harrison v. Anderston Foundry Co.* (1876), 1 App. Cas. 574; 36 Digest 563, 281.
- (3) *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co., Ltd.* (1907), 25 R.P.C. 61; 36 Digest 634, 1040.
- (4) *British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (1932), 49 R.P.C. 495; Digest Supp.; *affd.* (1934), 51 R.P.C. 254. G
- (5) *Andreas' Application* (1934), 51 R.P.C. 189.
- (6) *Natural Colour Kinematograph Co., Ltd. v. Bioschemes, Ltd.* (1915), 32 R.P.C. 256; 36 Digest 631, 996; *affg.* S.C. *sub nom.* *Re Smith's Patent* (1914), 31 R.P.C. 237.
- (i) *Tubes, Ltd. v. Perfecta Seamless Steel Tube Co., Ltd.* (1902), 20 R.P.C. 77; 36 Digest 610, 735. H

APPEAL from an order of the Court of Appeal dated July 29, 1937, reversing the judgment of LUXMOORE, J., in an action wherein the appellants were plaintiffs and the respondents were defendants. The

facts and the arguments are fully set out in the opinions of their Lordships.

W. Trevor Watson, K.C., Basil Drewe and James Mould for the appellants.

Lionel F. Heald, K.C., G. H. Lloyd-Jacob, and John Whitford A for the respondents.

LORD ATKIN : My Lords, I have had the opportunity of reading the opinion about to be delivered in this case by my noble and learned friend LORD PORTER. He has dealt in detail with all the facts relevant B to this appeal, and has discussed fully the scientific aspect of the case. I agree entirely with his reasoning and with his conclusions, and, finding myself quite unequal to dealing so satisfactorily with the subject, I refrain from attempting to repeat what he has said. I may say that the issue, putting it very shortly, is whether, as the Court of Appeal held, C the claim is for simple amplification or is for variation of amplification. It is plain from the result that opinions may reasonably differ. My own opinion is that, when the claims are read as they ought to be read in the light of the body of the specification, the inventor has sufficiently clearly indicated that his invention is for the use of the valve for varying from D time to time the amplification. I think that this is made plain by his recital of the difficulties which he has set out to remedy. The construction adopted by the Court of Appeal appears to me to be too narrow, and really inconsistent with the whole trend of the specification. However, if there were a reasonable doubt, I am firmly of opinion that we would be E bound to resolve it in favour of the patentee. It seems to me quite inadmissible to pass over the concluding words of the letters patent :

We do grant unto the said patentee that these our letters patent shall be construed in the most beneficial sense for the advantage of the said patentee.

They seem to have been regarded at times as a mere conventional form F of royal graciousness. In fact they are a material portion of the grant, and must be read as such. The grant gives protection to the invention of which the patentee "hath by and in the complete specification particularly described the nature." It is in aid of the protection so given that the words in question are used. They are now of statutory authority, for the G form of letters patent containing them is prescribed in the Patent Rules made in pursuance of the Acts. I do not think that any gloss put upon them in any decisions can prevent the court from giving them their full effect, and, so applied, they seem to enforce the construction contended for in this case by the patentee.

H On the question of disconformity, I would only add that it appears to me of great importance that the courts in this country should be careful not to allow narrow methods of construction to interfere with the beneficial provisions of sect. 91, which contains provisions for mutual protection of inventions by international arrangements. The right to protection is given to a person who has applied for protection for an in-

vention in the foreign state with which an arrangement exists. The protection is by sect. 25 (2) (l) withdrawn :

... [if] the invention claimed in the complete specification is not the same as that for which protection has been applied for in the foreign state. . . .

The patent laws of foreign states differ greatly. Some require formal claims, some do not. The only question in this case is whether the invention here claimed is the same as the invention for which protection has been applied for in the United States of America. For what invention the American application seeks protection is, I should have thought, a matter of American law. There is no evidence on this matter, and the courts must apply their own rules. In the United States of America, the matter rests—or at any rate rested at the trial—on the application alone. No final patent had been granted. I find it impossible to say that the patentee had not in the United States application claimed protection for the very use of the valve for which, in my construction, he claimed protection here. In my opinion, here also the beneficial construction clause of the letters patent comes into play. I would add that these common understandings in important commercial matters such as shipping, insurance, negotiable instruments, copyright, trade marks and patents are real aids to concord between nations. They should not be disregarded except on the plainest proof that the agreed terms are not observed. I think that this appeal should be allowed.

LORD RUSSELL OF KILLOWEN : My Lords, in this case, as in all patent actions in which the validity of the patent is contested, the question of construction is of primary importance, and is necessarily antecedent to the determination of the issues of want of novelty and absence of subject-matter. The Court of Appeal have stated that in their opinion no special rules are applicable to the construction of a specification, that it must be read as a whole and in the light of surrounding circumstances, that it may be gathered from the specification that particular words bear an unusual meaning, and that, if possible, a specification should be construed so as not to lead to a foolish result, or one which the patentee could not have contemplated. They further have pointed out that the claims have a particular function to discharge. With every word of this I agree, but I desire to add something further in regard to the claims in a specification. The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to limit, and not to extend, the monopoly. What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire document, and not as a separate document. Nevertheless, the forbidden field must be found in the language of the claims, and not elsewhere. It is not permissible, in my opinion, by reference to some language used in the earlier part of the specification to change a claim which by its own language is a claim for

one subject-matter into a claim for another and a different subject-matter, which is what you do when you alter the boundaries of the forbidden territory. A patentee who describes an invention in the body of a specification obtains no monopoly unless it is claimed in the claims. As LORD CAIRNS, L.C., said, there is no such thing as infringement of the equity of a patent : *Dudgeon v. Thomson* (1). With these preliminary remarks, I will turn to the specification in suit, and I will assume that your Lordships, with the assistance of counsel and the exhibit P¹, have been sufficiently instructed in the art to dispense with any further elucidation of the technical terms which we encounter.

We have heard much in this case about "volume control," a phrase which occurs twice, incidentally, in the body of the specification. I prefer for the moment to adhere to the language which the inventor uses in describing the invention—namely, that it has for its object the provision of a novel method of "controlling amplification" or "adjusting the transmission" through an amplifier, which comprises an electron discharge tube. Other expressions which occur in the specification refer to "decreasing amplification," to "adjusting the amplification rate," to "transmission control," to "amplification control," and to "regulating amplification." Here is a ringing of the changes indeed, but, when the patentee comes to state what is claimed, it is a "method of adjusting the transmission" through a particularly described kind of amplifier—namely, in an amplifier circuit, including an electron discharge tube wherein alternating current energy is relayed through the control action of a grid electrode upon an electron current in the vacuous space of the tube. The method is stated to comprise three steps :

1. Controlling by different amounts the portions of said electron stream flowing through different regions of said vacuous space by a special design of the tube electrodes.

2. Impressing upon the said control grid a steady polarising voltage.

3. Adjusting said polarising voltage to a value substantially different from that at which the total electron current falls to zero.

It is round the true construction of this claim, which is the first claim, and which, in my opinion, is the only one that matters, that the battle has raged.

Read in accordance with what I understand to be the ordinary meaning of the language used, it describes a method of amplification in which the required degree of strength can be reached by changing the polarising voltage impressed on the control grid to some value removed from the cut-off point, but with this feature, that, by means of a special design of the tube electrodes, the control grid exercises control to different extents over different portions of the electron stream. This control I allude to for brevity's sake as differential control. The appellants, however, contend for a narrower construction, and, as is usually the fate of those who seek to depart from the natural meaning of language, and to read in words which are absent, the contention seems to vary from time to time. They sometimes say that it is limited to a method of

controlling amplification when used for the purpose of accommodating weak and strong signals. They sometimes say that it is limited to a method of amplification by the use of a valve having a characteristic curve which possesses what has been called a long tail, and which can be operated on throughout its whole length without introducing excessive distortion. In the argument before your Lordships, it was contended that the claim was limited to a method of adjusting transmission which consists of variation of amplification as distinct from amplification *simpliciter*. A

I am not sure what was the exact construction which LUXMOORE, J., assigned to the first claim. He rejects the view that "it merely discloses the use of a valve with variable amplification in the ordinary way an amplifying valve is used in an ordinary amplifier circuit," having just previously stated that the specification showed that the object of the setting out and adjustment of the amplifier circuit was "for the purpose of attaining volume control able to accommodate loud and soft signals without distortion." However, he seems to found upon a view (which appears to me clearly wrong) that "the third step limits the method to working on the tail of the characteristic." Indeed, he goes so far as to say that an amplifier circuit which made no use of the lower part of the characteristic would not be within the claim. B C D

The Court of Appeal took the view that the first claim (apart from the reference to the differential control by a special design of the tube electrodes) merely describes and claims an old and well-known method of using an ordinary triode valve for the purpose of amplification, in which the user, if he wishes to change the rate of amplification, adjusts the transmission through the amplifier by varying the polarising voltage of the control grid from, say, minus 3 volts to, say, minus 5 volts. They pointed out that in so acting, even if he makes no further change in the polarising voltage, he will have used a method of adjusting the transmission which comprises the three steps of controlling the electron stream, impressing upon the control grid a steady polarising voltage, and adjusting it to a value substantially removed from the cut-off point. They further considered it impossible to say that the meaning of the word "adjust," necessarily connoted, or was confined to, making more than one change or a series of changes. If this is a correct view, the result is that what the patentee claims as his invention is an old and well-known method of adjusting transmission through the described amplifier, but with the substitution of a grid electrode that will exercise differential control by a special design of the tube valve. My Lords, I agree completely with the Court of Appeal's construction. It is a construction which makes the claim on the face of it a reasonable and a probable claim, and it is a construction which agrees with the plain, unvarnished, grammatical meaning of the words selected by the patentee to describe the monopoly which he claims. E F G H

I would point out that there is no question here of words in the first

A claim bearing any special or unusual meaning by reason either of a dictionary found elsewhere in the specification or of technical knowledge possessed by persons skilled in the art. The *prima facie* meaning of words used in a claim may not be their true meaning when read in the light of such a dictionary, or of such technical knowledge, and, in those circumstances, a claim, when so construed, may bear a meaning different from that which it would have borne had no such assisting light been available. That is construing a document in accordance with the recognised canons of construction. However, I know of no canon or principle which will justify one in departing from the unambiguous and grammatical meaning of a claim and narrowing or extending its scope by reading into it words which are not in it, or which will justify one in using stray phrases in the body of the specification for the purpose of narrowing or widening the boundaries of the monopoly fixed by the plain words of a claim.

C A claim is a portion of the specification which fulfils a separate and distinct function. It, and it alone, defines the monopoly, and the patentee is under a statutory obligation to state in the claims clearly and distinctly what is the invention which he desires to protect. As LORD CHELMSFORD said in this House many years ago in *Harrison v. Anderston Foundry Co.* (2), at p. 581 :

The office of a claim is to define and limit with precision what it is which is claimed to have been invented and therefore patented.

E If the patentee has done this in a claim the language of which is plain and unambiguous, it is not open to your Lordships to restrict or expand or qualify its scope by reference to the body of the specification. LORD LOREBURN, L.C., emphasised this when he said in *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co., Ltd.* (3), at p. 83 :

F The idea of allowing a patentee to use perfectly general language in the claim, and subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the specification, is wholly inadmissible.

The same view was expressed by ROMER, L.J., in the following felicitous language in *British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (4), at p. 556 :

G One may, and one ought to, refer to the body of the specification for the purpose of ascertaining the meaning of words and phrases used in the claims or for the purpose of resolving difficulties of construction occasioned by the claims when read by themselves. But where the construction of a claim when read by itself is plain, it is not in my opinion legitimate to diminish the ambit of the monopoly claimed merely because in the body of the specification the patentee has described his invention in more restricted terms than in the claim itself.

H I have read and re-read the specification many times and with much care. Twice does the inventor describe his invention—once in the body of the document and again in the first claim. In neither case is there any mention of the strength or weakness of signals, or of distortion. It is in each case described as “a method of adjusting transmission” through the described amplifier. In other words, it is a method of

amplification. Every amplification is an adjustment of transmission. Every adjustment of transmission is amplification, that word being apparently applicable to reduction as well as to increase. Much stress was laid upon the fact that the body of the specification contains references to strong and weak signals, to modulation-distortion, and to the experiments made and the results obtained and illustrated in Figures 1, 2, 3 and 4. Indeed, it is these references and experiments, and the information thus imparted, which form the matter relied upon as a justification for departing from the plain language of the first claim. In my opinion, they furnish no such justification. They are included, and properly included, in the body of the specification because they indicate the advantages (ascertained by experimenting with valves which had the special design of tube electrodes) which would accrue from using the claimed "method of adjusting transmission." That, as pointed out by the Court of Appeal, is the proper place for them to occupy. They must not be read into claim 1. They have no place there, because they form no part of the invention. They are advantages which accrue from using it.

There are, however, features in the body of the specification which, to my mind, throw a vivid light upon the situation, and explain much in this case that might otherwise have been obscure. The patent is what is generally known as a convention patent, obtained in this country by assignees of one Harold Snow, who had applied in the United States of America for protection for a vacuum tube with the special design of the tube electrodes in the following terms :

... a vacuum tube comprising an evacuated envelope enclosing a cathode, a control grid and a plate, the physical arrangement of said cathode, grid and plate being such that the control of space current flow exercised by the voltage applied to said grid is different at different parts of the electron stream.

Snow's application discloses all the different physical arrangements which result in the production of this differential control. He obviously was claiming to be (as he believed he was) the first inventor of the special design of tube electrodes which produced this result. It is equally obvious from the patent in suit that his assignees were of the same belief, and thought that that was the real invention in the matter. The specification abounds in demonstrations of this view. It is entitled : "Improvements in Electric Wave Amplifying Apparatus." Six times it refers to tubes, or valves or circuits "embodying the invention," and once to the employment of tubes "constructed in accordance with the invention." There is nowhere any hint or suggestion that the invention consists of a new application of a known article. When, in addition, the fact is established, as LUXMOORE, J., has found, that "the problem with regard to volume control in receiving sets of high sensitivity required to deal with loud and weak signals had not arisen at the date of the patent in suit," the true position becomes, in my opinion, abundantly plain. The patentees have by this specification sought to protect a device which

they believed their assignor had invented, and they have sought to protect it by claiming a method of adjusting the transmission through the described amplifier (i.e., a method of amplification) which employed that device. Upon discovering that the device had, unfortunately for them, been anticipated by Huth (to say nothing of Siemens and Halske),

A the suggestion is evolved that claim 1 is not for that which its natural meaning conveys, but for something narrower, the justification for this narrowing of the monopoly being sundry phrases picked here and there from the body of the specification. I cannot assent to this suggestion. It looks to me like throwing scientific dust in the eyes of the court. To

B my mind, this is a plain case of plain English, in which your Lordships stand in no need of scientific witnesses or counsel to assist you in arriving at the true meaning of the language used. It is not contested that, upon the construction of the claim adopted by the Court of Appeal, claim 1 is invalid, but, whether contested or not, I agree with the Court of Appeal

C that, if any of the designs indicated by Huth were used in a triode for the purpose of amplification, the user must necessarily infringe claim 1, and that claim 1 has accordingly been anticipated, and is, therefore, bad. I would dismiss this appeal on that ground alone. Assuming, however, that the claim is of narrower scope, and that the claim is limited to the

D use of a valve having a characteristic curve of the type indicated by Snow, and applying to that valve such steady polarising voltages, and varying them from time to time to such values, as will enable the whole length of the characteristic curve to be used for amplification of varying amounts without distortion, I am of opinion that there would be no

E inventive step, and that the patent would be bad for want of subject-matter. What is the inventive step which it is alleged is involved? It is said to be the appreciation that differential control could be usefully combined with grid bias volume control. It is necessary, however, to see how matters stood at the date of the patent.

F The evidence, in my view, justifies the following statements. (i) It was known that grid bias could be, and was, used for the purpose of controlling amplification or adjusting transmission in an amplifier which comprised an electron discharge tube. Large numbers of Phillips sets and Burndept sets were in successful use, and the suggestion of Dr.

G Eccles that the grid bias method was shunned has no justification beyond the fact that the many other sets used other methods. (ii) It was known that there would in theory be a disadvantage or drawback arising from the fact that the valves ordinarily in use had a characteristic which, to use the words of Dr. Eccles, "gets more and more curved as you ask it

H to magnify less and less." In other words, the theoretical disadvantage or drawback was the absence of a long tail. I use the word "theoretical" because in fact there is no evidence of any such disadvantage or drawback at the relevant date. The problem had not arisen. (iii) It was known that some triode valves had in fact characteristics with longer tails than others. (iv) It would be clear to anyone skilled in the art that

the trouble would be in the shape of the characteristic curve, and that he must, if he could, change the shape of the characteristic, so as to obtain a characteristic with a long tail. This last result is exactly what Siemens and Halske teach you how to achieve. They tell you explicitly how to elongate the tail of the characteristic without affecting the head of the curve. That is precisely what Siemens and Halske set out to do, and it is precisely what they succeeded in doing, although (but that is quite immaterial) they set out to do it for a different purpose, and for a purpose unconnected with the matters now under consideration. The specification states (I paraphrase and abbreviate the language) that most of the usual valves cut off at a small negative grid bias, and that that causes distortion. It states a method of obtaining the desired action thus :

... by using valves the characteristic line of which has such a shape that at a given anode voltage the zero point of the control voltage will correspond to a point close to or on the lower bend or kink of the characteristic line, whilst in spite of that the zero point of the anode current will be situate so far in the negative that even in the case of normal symmetrical controlling out . . . it will not be reached by the control voltage. The characteristic line must therefore be asymptotic to the grid voltage axis.

It states later that, in order to obtain a valve with such a characteristic, the grid of the valve is made according to the invention in such a manner that it has along the electrodes various conductance passages (i.e., various streams). The specification continues :

If the electrode system is considered as divided into small single elements of equal length extending along the grid, for a given anode voltage will be obtained single characteristics of which that corresponding to the greatest conductance passage extends very far into the negative and which added together give the desired shape of characteristic line.

Figures 5, 6 and 7 illustrate this method "for carrying out the invention, namely, the asymptotic shape of the characteristic line of the valves." Figures 5 and 7 show this shape, with a long tail. Figure 6 shows an example of an electrode system by means of which this desired shape can be obtained, the grid having a width of mesh different at different points of its length. The body of the specification concludes thus :

By a suitable distribution of the meshes or conductance passages along the electrode system it is thus possible to obtain any desired shape of characteristic line, more particularly a shape which has for the zero point of the control voltage a steepness which is half as great as that of its rectilinear portion. It goes without saying that the difference of the conductance passage along the electrode system could also be produced by some other means, for instance, by a difference in the distance between the grid and anode or the grid and cathode, and in valves with a "space charge" grid if desired also by a corresponding construction of the "space charge" grid.

Nothing, it seems to me, can be plainer than that this specification states that, if you want a long-tailed characteristic, you must have differential control, and that this can be obtained by departing from symmetry in your electrode system, either by having a varying meshing in your grid, or by having different distances at different points between the grid and the anode or between the grid and the cathode. I do not pause to analyse Huth, but he also teaches how to obtain by the same kind of

asymmetrical electrode system a characteristic showing an extended cut-off without pronounced curvature.

A With that teaching available, I find it impossible to say that any inventive step was needed in arriving at the invention alleged to be protected by claim 1 of the patent in suit. As I envisage it, the only problem to be solved was to get a valve with a characteristic which did not "get more and more curved as you ask it to magnify less and less"—that is, to get a valve with a long-tailed characteristic. That is exactly what Siemens and Halske tell you how to obtain, by "a device in which control electrode means exercise different rates of control over different electron streams." It is said that I ought not so to decide because B LUXMOORE, J., who heard the witnesses, held that there was an inventive step, and that, therefore, subject-matter existed. LUXMOORE, J., based his view on the evidence of Dr. Eccles and Mr. Gill, but, on a consideration of their evidence, I have come to the conclusion that it does not C justify the finding.

In 1930, the valves then in use were used successfully for grid bias volume control in circuits such as those described in the patent in suit, but it was recognised that, if and when there occurred any great increase in the strength of signals (I am speaking of this country, and in connection with an English patent), trouble would arise with the existing valves, because their range of amplification rates would be inadequate, and because, in cutting down a very large signal by applying large negative grid bias (i.e., doing what is called working on the tail), distortion would result. None of the witnesses in the case had ever in fact considered D this question. They are all, on this point of inventive step, witnesses testifying on a hypothesis. The evidence of Dr. Eccles when he said that, if he was shown a Boonton tube and its long-tailed characteristic for the first time, he would have been very surprised, is evidence given (as subsequently appeared) in forgetfulness of Siemens and Halske. Indeed E he stated in one answer that what he learned from the patent in suit was that to get the long-tailed characteristic you would need to provide along the control electrode or grid various conductance passages. Mr. Gill had never been faced with or considered the question at all, and, when he said that Siemens and Halske would not have suggested the solution F to him, he seems to be deciding hypothetically the very question in issue. The real and only relevant question is: what would Siemens and Halske tell a person who read their specification having the problem in his mind, and seeking its solution? Professor Appleton is the only witness who appears to me to deal with this. He was not in fact G acquainted in 1930 with either Siemens and Halske or Huth, nor was he worried in 1930 about volume control, and he further stated that Siemens and Halske (dealing, as it did, with push-pull receivers) would not necessarily have brought volume control to his mind. On the relevant H question, however, his answer is clear and explicit. It runs thus:

May I make it quite clear? If I had read this specification and not been worried

as I was not in 1930, about volume control, I do not think that would have told me straight away that that was a valve suitable for volume control ; but if I had been faced with . . . the difficulty of wanting a valve which would be very suitable for volume control for a larger range than the valves I was using, and I had read this specification I would have said immediately, " Ah ! this is just what I want."

That deals with the exact point, and, in my opinion, it destroys the possibility of holding that the alleged invention covered by the more A restricted construction of claim 1 required any inventive step.

There remains the question of disconformity. Upon this matter I will not trouble your Lordships with many words. I have had an opportunity of reading and considering the opinion of my noble and learned friend LORD WRIGHT. I agree with it, and, with him, I am unable to find any B means by which the appellants can escape from the horns of the dilemma which is stated in para. 49 of the respondents' case. I would dismiss this appeal with costs.

I must, however, add that I dissent from the view that the concluding words of the form of letters patent afford any assistance in, or have any C relevance to, the question of the meaning or construction of the language used in a specification. Whatever effect they may produce in regard to the construction of the document in which they occur, they have not, in my opinion, any relation to a specification. The construction of a D specification is subject to no special rules. When I was a judge sitting in the Chancery Division, I tried many patent actions which involved fine points relating to the construction of specifications, but not once were these words in letters patent cited or prayed in aid on behalf of a patentee.

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LORD MACMILLAN : My Lords, the Patents and Designs Act, 1907-32, s. 25 (2) (i), warns the would-be inventor that his patent may be revoked if the complete specification does not sufficiently and clearly ascertain the scope of the monopoly claimed. The present case, in its three stages before LUXMOORE, J., the Court of Appeal, and this House, has occupied F some 60 days of judicial time, a substantial part of which has been devoted to the discussion of the question of the scope of the monopoly claimed, and on this question the Court of Appeal have differed from the trial judge and your Lordships are not at one. How can it, in these circumstances, be maintained that the specification in suit sufficiently G and clearly ascertains the monopoly claimed ? How can it be said that it clearly indicates to the manufacturer, or even to the technical expert, what may, and what cannot, be done without infringing the patent ? I do not believe that, where an inventor has a clear conception of his invention, and desires to describe it clearly, the resources of the English H language are inadequate for the purpose, even in the case of so highly technical an art as that of wireless transmission.

I do not propose to demonstrate the difficulties which the present patentees have created for themselves by the language which they have employed in their specification. These difficulties sufficiently appear

from the opinions of my noble and learned friends which I have had the advantage of reading in print. For myself, I confess that even yet I can form no confident view as to the true meaning of claim 1. I find it sufficient for my purpose to say that, whichever of the two rival readings be the true one, the patent fails for want of subject-matter. The

A asymmetric grid was already known, with its characteristic curve, and its utilisation in the manner indicated on either reading of claim 1 did not, to my mind, in the existing state of the art, involve invention. I find myself also in agreement with my noble and learned friends LORD RUSSELL OF KILLOWEN and LORD WRIGHT on the question of disconformity.

B Either of these grounds, if sustained, is fatal to the appeal, and I am for dismissing it with costs.

LORD WRIGHT: My Lords, your Lordships have been so fully acquainted with the technical aspect of this appeal in the course of the

C 21 days occupied by the able counsel on one side or the other that I do not think it necessary to dilate on these aspects. I shall devote myself—at least at the outset—to considering one particular defence, that of disconformity in the sense that sect. 91 of the Patents and Designs Acts has not been complied with. That section, so far as material, provides

D that a person who has applied for protection of any invention in any state with the government of which His Majesty has made arrangements for mutual protection of inventions shall be entitled to a patent for his invention in priority to other applicants, the patent having the same date as the date of the application in the foreign state. The same right is

E enjoyed by the applicant's legal representative or assignee. The application must be dated, in the case of a patent, within 12 months from the application for protection in the foreign state. The patentee cannot claim damages for any infringement happening prior to the actual date on which the complete specification is accepted, but the patent granted

F for the invention is not invalidated by publication or user in this country during the period specified by the section as that within which the application may be made. With this section must also be read sect. 25 (2), which states the cases in which a patent may be revoked and includes in para. (1):

G . . . in the case of an application made under sect. 91 of this Act, that the invention claimed in the complete specification is not the same as that for which protection has been applied for in the foreign state. . . .

Subsect. (3) enacts that every ground on which a patent may be revoked shall be available as a ground of defence in an action for infringement

H of a patent.

In this case, the respondents have pleaded that, if the appellants are right in the construction which they set up of their specification, then the invention claimed in the complete specification is not the same as that for which protection was applied for by the appellants' assignors in the United States, which is a foreign state to which these

reciprocity provisions of the Act apply. The application on which the patent in suit was granted was made under the section in virtue of the convention to which this country and the United States were parties. The convention date—that is, the date on which the application was made in the United States—was Mar. 19, 1930, the application date in the United Kingdom was Mar. 6, 1931, and the complete specification was accepted on July 6, 1932. The appellants might have ignored the convention method and applied in the ordinary course for a patent in this country, but in that event they would have lost the priority consequent on dating back to the convention date. The relevant sections require a comparison between the United States application and the complete British specification in order to ascertain whether or not the invention protection for which was applied for in the United States, and the invention claimed in the complete British specification, are the same. It is not material to this inquiry to consider whether any, and, if so, what, patent was granted on the foreign application. In the present case, your Lordships have not been told, and did not press to have your curiosity satisfied. Nor is the form of the British application material. What is material is the complete specification, or, rather, what it claims. It does, indeed, appear from the face of the complete specification that it was divided out of an earlier application. It was indicated to your Lordships that the earlier application included both an apparatus claim and a method claim. The importance of this distinction will appear later. A B C D

The question of disconformity was not discussed by the Court of Appeal, because on other grounds they had held the patent invalid. The question did, however, arise on the decision of LUXMOORE, J. Indeed, it must arise if the appellants' construction of the specification is accepted and the patent is held good as for a method or combination. The peculiarity of this case is that the device or mechanism which Snow in the United States specification claimed as his invention is now known to be anticipated in England, and cannot be the subject of a valid patent. F How that matter stands in the United States your Lordships have not been told, nor is it material. As to the English position, however, I agree with the finding of the Court of Appeal that the device or mechanism of the differentially and automatically controlled valve or tube is anticipated in this country by Huth, and even more clearly by Siemens and Halske. If, therefore, the invention for which protection was applied for in the United States application was limited to the mechanical device of the valve, the patent in suit must be invalid on the ground of anticipation, unless the appellants can show that the patent claims an invention different from that for which protection was applied for in the United States. In that event, they are met by the difficulty under sect. 91 and sect. 26 (1), (2), that the patent claimed is not the same as that applied for in America. Hence it is said that there is a dilemma on one horn of which they must be impaled. While reliance on a dilemma is not generally to be encouraged, I can see no escape from this dilemma except G H

on the basis that the apparatus claim and the method claim are not different, but the same, or, alternatively, that the United States document applied to protect both claims if they were different. I do not think it arguable that the two claims are the same, and hence it remains to consider what exactly is the invention to protect which the United States A document applied.

There is a want of authority on the construction of what I may call the convention sections of the Patent Acts. In 1934, the case of *Andreas' Application* (5) came before LUXMOORE, J., sitting as the patents appeal judge as constituted by the amendments to the Act of 1932. Before these B amendments, appeals from the Controller-General's decision had gone to the law officers (*inter alia*) on the question, under sect. 11 (e), whether, in the case of an application under sect. 91, a specification claims an invention other than that for which protection has been applied for in the foreign state when there is opposition on the grounds set out in the C section. LUXMOORE, J., pronounced against the grant of the English patent, on the ground of disconformity. It was argued that there was no disconformity, because, though the British patent differed from the German application, the differences were what were justifiable under the doctrine called the doctrine of legitimate development, which might D be invoked in regard to a provisional and complete specification for a British patent. LUXMOORE, J., refused to follow a decision of the Solicitor-General, and reverted to the earlier decisions of law officers who had held that applicants could not get the benefit of the priority for an improved and more detailed description of the old invention, and had E held that the grant must be confined to the thing for which protection was applied for in the foreign application. I think that this view is correct. Indeed, Mr. Trevor Watson did not contend for the doctrine of legitimate development. His contention was more subtle. He argued that, because in the United States application there was a full description F of the user of the new tube or valve, the British grant might be made for the method of using so described, even though the foreign application was limited to the tube or valve. It may be that the inventor in the United States might have amended his application so as to include both the method and the mechanism, but, however that may be, he has in G fact not done so in the relevant application. In dealing with convention patents, the date of the foreign application is all-important. It is that date which fixes the priority. Hence the British grant must be confined to the limits of what is therein applied for. The foreign inventor, if he is not content with what he included in his foreign application, may in H some cases seek to avail himself of sect. 91 (2) (but I question if that could have been availed of in this case), or he can disregard the convention altogether, and apply in the ordinary way for a British grant in respect of the method combination now embodied in the British grant. In that case, he would have lost the priority, to which, in my judgment, he was never entitled. The peculiarity of this case is that the United States

application is based, whether rightly or not, on the idea that Snow was the first inventor of the tube, whereas the British patent is at least consistent with no such idea. It is based, or may be based, on a combination of non-patentable elements, the special tube and the negative grid bias. The question of priority of date may be of vital importance in this respect. The problem was becoming, or soon became, pressing in England. The separate elements of the combination had been published. At any moment someone engaged in the art might hit upon the combination, which I here assume involved an inventive step. Hence the importance of the date. A

To my mind, however, there is a further confusion which is involved in failing to distinguish between description and protection applied for. There are some countries which do not have the British and United States method of formulating claims in an application. In such cases, no doubt, it is necessary to extract from the application as a whole the substance of what it is sought to protect and to compare that with the claims in the British specification. It is always necessary, however, to distinguish from what is claimed as the invention the descriptive or explanatory matter which goes with the invention, and which is generally necessary or convenient to show how, and for what purpose, it may best be used. In the present case, as I read the United States application, what Snow was applying to protect was what was set out in his claims, and it is these which must be compared with the claims in the British specification, of which it is only necessary here to discuss claim 1. In determining the scope of the application, the claims are most material matters to consider, in all cases in which the national system requires claims to be formulated. I find it difficult to think of such a case in which the application would be construed as seeking to protect what is not claimed. In the present case, however, I do not think that that difficulty arises. B C D E

I should like to protest against substituting for the language of the Act in sects. 91, 25 (1), (2), and 11 (i) (e), which deals only with what the applicant applies to protect, the word "describes," which the Act does not use in reference to the foreign application. Even if the word "describe" is used at all in practice in this connection, its use can only be justified if it is understood as meaning "describes as the invention," which might be appropriate enough in the case of a foreign application which has no claims. I must seek to justify my view that the United States application only applies to protect the tube or valve as a mechanical device, and that the elaborate specification is occupied merely in explaining its use and describing how it works, for the information of the public, and not as involving any separate matter of invention. In order to make this good, I must refer at some little length to Snow's application. It is almost inevitable that Snow, having invented the device, should not think of its manner of use as a separate matter. It is not obviously necessary that he should do so, because, if he was protected as regards the device, it could not be used by anyone else without an infringement. F G H

The importance of severing the device from the method of using it only emerges when it is ascertained that the device is not novel. If the method can be protected, the patentee may be as well off as if he had a patent for the device itself, which he cannot acquire. If this view prevails, he would get all the benefits of the device or apparatus patent.

- A** I shall preface my analysis of the Snow application by quoting in full from it claim 1, and comparing that with claim 1 of the patent in suit. I do not think it necessary to go beyond claim 1 in either case. The twelve claims in Snow's application do not depart in substance from claim 1, and, in regard to the patent in suit, the elaborate discussions
- B** before this House have centred round claim 1, by which it is agreed that the fate of the patent must stand or fall. I am also presupposing that claim 1 in the patent in suit means all that the paraphrase by Mr. Trevor Watson, quoted in the judgment of the Court of Appeal, says that it means. I necessarily at this stage assume that claim 1 of the patent in
- C** suit has subject-matter, in the sense contended for by the appellants, since it is only in that event that these questions need, or can, be considered. Hence the Court of Appeal, finding there was no novelty in the claims in the patent in suit, did not find it necessary to discuss the issue of disconformity. That issue did, however, arise under the decision of
- D** LUXMOORE, J., but unfortunately he did not discuss it, because, as he says, he had the idea that it was not being pressed. This is now conceded to have been a misapprehension on the part of LUXMOORE, J. Claim 1 in Snow's application is in these terms :

E A vacuum tube comprising an evacuated envelope enclosing a cathode or control grid and a plate, the physical arrangement of the said cathode, grid and plate being such that the control of space current flow exercised by the voltage applied to said grid is different at different parts of the electron stream.

- Snow here states the object aimed at, but he uses the function to describe the physical arrangement of the tube which he is claiming. Similarly all through the other claims he is dealing with the construction of a tube.
- F** Claim 1 of the patent in suit has been so often cited that I hesitate to quote it in full. It is a method of adjusting the transmission which comprises the three steps which are now so familiar. The method is to be employed in an amplifier circuit including a discharge tube, but there is no claim for the tube. I disregard the other claims, including claim 5,
- G** which could be justified, if at all, only on the basis of a method or combination claim. This comparison would in itself be sufficient to show that what Snow applied to protect was something different in substance, not merely in form, from what was claimed in the patent in suit. That view is confirmed, in my judgment, by the remainder of the application.
- H** The petition is expressed to be for improvements in vacuum tubes. The specification begins :

This invention relates to vacuum tubes of the type including a cathode, a control grid and a plate.

It states the problem of preventing modulation distortion, which was obviously already realised in the United States. It then states the object

of the invention in four ways, but in each the object is to provide a vacuum tube with certain operating characteristics. It then refers to eleven figures, showing, among other things, the performance of an amplifier embodying the novel form of tube. It refers to what it calls the present commercial tubes, and explains that, except for the novel construction of the control grid, the several elements of the tube may be the same as those of the commercial tube, and describes the differences exhibited by the physical embodiment of the invention from the known constructions, which differences result in the control exercised over the electron stream not being uniform over its entire extent. It then explains various control grid constructions, or other physical arrangements of the tube elements calculated to achieve this control. It then proceeds to discuss how the novel tube may be used and describes the transfer characteristic curves : A

It is well known that the amplification of a vacuum tube may be regulated by adjusting the bias voltage in the control grid, the amplification decreasing as the bias voltage becomes more negative. C

Then it compares the results with the former constructions with those resulting from tubes embodying the invention. It examines at considerable length the result of using the new invention, especially in regard to modulation distortion, and recounts the inventor's experiments, "by employing tubes constructed in accordance with the invention." It adds that the invention is not limited to any particular type of tube, but provides in a single tube the electrical equivalent of two or more tubes operating in parallel. From beginning to end the invention is defined as being that of a novel construction of tube, which produces this result by a particular construction of the control grid or the physical arrangements of the tube elements. What these are your Lordships have heard many times discussed. The body of the specification seems to me completely to confirm what appears in the claims. D E

The patent in suit shows a very different position. It does indeed embody all the descriptive portions dealing with the working of the tube taken bodily from Snow's application. In fact it is said that 90 per cent. of the patent in suit is taken from Snow. However, it is used for a different purpose—not to show the working of a novel construction of tube, but to claim a method of using the specified construction of tube with other elements, all of which Snow treated as merely descriptive of the obvious or preferred mode of using his invention. The specification commences by stating that it has for its object the provision of a novel method of controlling amplification effected by a circuit comprising an electron discharge tube. After setting out the statement of the modulation problem taken verbatim from Snow, it proceeds, "In the carrying out of the invention there is employed a device. . . ." It does not claim the device. It then sets out the five claims, which I need not repeat. Having done this, it again borrows from Snow, leaving in such inappropriate phrases as "tubes embodying the invention" or "tubes constructed in accord- F G H

ance with the invention." These phrases, while apt in Snow's application, are merely inaccurate in the patent in suit. The specification refers to five figures, which to some extent agree with a corresponding number of those appended to Snow, but figure 5 in the patent which illustrates claim 5 has no precise counterpart in Snow, and Snow, being concerned primarily with the physical construction of his new tube which is to give differential control, illustrates more instances of the physical types. In the final paragraph, before the claims are stated, there is a slight, but perhaps not insignificant, departure from Snow. In Snow the words are :

It is understood that the invention is not limited to any particular type of tube, but is in general applicable to all tubes employed for amplification control.

In the patent in suit, for the words "tube" and "tubes" the words "amplifier" and "amplifiers" are substituted—"in which tubes are employed for amplification control." In the one case, Snow makes it clear that he is claiming a particular construction of the tube. In the other, the patent in suit is dealing with an amplifier in which the tube is only one element, and for which *per se* no claim is made.

I think that I have sufficiently explained why I have come to the conclusion that the invention claimed in the patent in suit is different from that which Snow applied to protect. It follows that, in my judgment, the defence of disconformity is made out, and the appeal on that ground must fail. Obviously, on the view adopted by the Court of Appeal, the question of disconformity did not arise.

This makes it unnecessary for me to discuss questions of construction, of subject-matter or of anticipation. I apprehend that your Lordships do not see eye to eye on these questions. I have already occupied your Lordships so long on disconformity that I may be pardoned if I do not do more than glance at these questions. On the vital issue of what is the true construction of claim 1, the appellants have contended for a qualified or narrowed meaning of the claim, to be achieved by reading into the actual words of the claim supplementary elements drawn from the body of the specification. This contention involves a principle of construction. I need not develop this matter at length, however, because I agree with the enunciation of the true principles of construction in this connection which was made by LORD ROMER in delivering the judgment of the Court of Appeal, and with the statement to the same effect which has just been expressed by my noble and learned friend LORD RUSSELL OF KILLOWEN. Such principles are fatal to the construction for which the appellants contend and which is essential to their case. In this particular instance, there is a special difficulty in reading together the body of the specification and the claims, because, while the latter are for a method and combination invention, the invention is more than once in the body of the specification expressed to be embodied in a tube of a particular device. However, I do not base my conclusions on this discrepancy, or on some other minor considerations, but on general principles of construction. I need not quote the pregnant words of LORD LOREBURN, L.C., in *Ingersoll Sergeant*

Drill Co. v. Consolidated Pneumatic Tool Co., Ltd. (3), at p. 83; and in *Natural Colour Kinematograph Co., Ltd., v. Bioschemes, Ltd.* (6), at p. 266. I agree with the construction of the claims arrived at by the Court of Appeal and by LORD RUSSELL OF KILLOWEN. The real invention, I may add, was the special form of tube that could only be used in conjunction with one of the regular and known forms of amplifiers, and one of these included the grid bias method. Snow himself seems to me to emphasise this. This position is not changed when it turns out that the tube is not patentable because anticipated. A

On the whole question of subject-matter, however, I agree with what has been said by my noble and learned friend LORD RUSSELL OF KILLOWEN. B In my judgment, the appeal should be dismissed.

LORD PORTER: My Lords, by application dated Mar. 19, 1930, Harold A. Snow, an employee of the Boonton Research Corporation of New Jersey, United States of America, applied to the commissioner of patents in the United States of America for letters patent for improvements in vacuum tubes. The invention in respect of which protection was applied for was described as a new or modified form of amplifying tubes primarily used in radio receiving apparatus, but not confined to that use. The invention appears either to have belonged, or to have been assigned, to his employers, the Boonton Research Corporation. D At any rate, that corporation on Mar. 6, 1931, applied (in the United Kingdom) under the provisions of the Patents and Designs Acts, 1907-32, s. 91, for protection in this country. The protection asked was, we were told, applied for under two separate specifications (i) for the apparatus, E and (ii) for its use for certain purposes. The latter specification is that with which we are concerned and one of the matters in issue before us was as to the limits of the use claimed. The complete specification was accepted on July 6, 1932, under letters patent numbered 376,737 and bearing the convention date Mar. 19, 1930. On Apr. 2, 1934, the Boonton F Research Corporation assigned these letters patent to Electric and Musical Industries, Ltd.

On June 21, 1934, Electric and Musical Industries, Ltd., and Boonton Research Corporation issued two writs, one against the defendants Lissen, Ltd., and the other against C. Kalis, for an injunction to restrain G the defendants from infringing this patent and for further consequential relief. On July 9, 1934, they delivered two statements of claim, one against each defendant, complaining as against the first defendants (i) of the sale and supply by them to the second defendant of a particular wireless set with directions for operating it, (ii) of its manufacture, and H (iii) of its use for test. As against the second defendant, they complained (i) of its use by way of demonstration, and (ii) of its sale with directions for operating it. On Oct. 9, the two actions were consolidated, and on Nov. 13, 1934, the defendants delivered their defence, denying infringement and stating that the letters patent were invalid. With their defence

they delivered particulars of objections, which were later—namely, on Nov. 6, 1935—amended.

A The objections may be briefly summarised under the headings (i) want of novelty, the Patents and Designs Act, 1907-32, s. 25 (a) (e), (ii) want of subject-matter, sect. 25 (f), (iii) disconformity, i.e., that the invention is not the same as that for which protection has been applied for in the United States of America, sect. 25 (2) (l), and (iv) ambiguity, sect. 25 (h) (i). B Infringement was not admitted, but the facts set out in the particulars of the statement of claim were undisputed, and it was admitted that, if the construction put upon the specification by the plaintiffs was correct, B infringement at least of claim 1 had taken place. After a hearing of 23 days, LUXMOORE, J., delivered judgment, restraining the defendants from infringing the patent and granting consequential relief, and dismissing the defendants' counterclaim, which prayed for revocation of the letters patent in suit. From this decision the defendants appealed to C the Court of Appeal, who, after a hearing of 16 days, allowed the appeal, dismissed the action, and ordered the revocation of the letters patent. The plaintiffs thereupon appealed to your Lordships' House, and the hearing of that appeal has occupied the space of 21 days.

It is obvious that the issues are difficult and important, and such as D may well give rise to conflicting opinions. In expressing the views I have formed, I do not find it necessary to set out at length the principles applicable to a proper understanding of the art or of the technical questions involved in the action. They appear sufficiently both from the judgment of LUXMOORE, J., and from the judgment of the Court of E Appeal. It is, I think, enough for me to say that in modern radio reception a vacuum tube is used for the amplification and transmission of the incoming waves received by the aerial, or perhaps, more accurately, for the amplification and transmission of an image of these waves, so that they or their image ultimately reach the loudspeaker in a rectified or F demodulated form. Modern sets use more than one tube, but it is sufficient for the purpose of the present case to confine the attention to a single tube. Modern tubes often contain more than three electrodes, but it is sufficient to consider a tube containing three electrodes, to which the name "triode" is given. These electrodes are (i) the cathode from which G electrons are drawn to the anode to pass out of the tube in the form of anode current, (ii) the anode to which the electrons pass, and (iii) an intermediate electrode, commonly called the control grid, upon which the alternating impulses from the receiving aerial are impressed so that they affect the stream of electrons passing from the cathode to the anode. H This control grid was, at any rate until 1930, usually constructed of wire in the form of a helix, the coils being equal and symmetrical, and each coil being at the same distance as that of the other coils from the anode, and at the same distance as that of the other coils from the cathode.

One of the essential elements in the apparatus for receiving wireless messages is to obtain sufficient amplification of the signals carried and

received, and this was particularly necessary in England up to 1929, before the regional scheme for wireless despatch was adopted, because the signals then despatched were weak, and the stations were often distant. For this purpose, the triode was an effective instrument, but it suffered in one method of use from a disadvantage material to the matters in issue in the present case. In order to explain that disadvantage, however, it is necessary to consider in a little more detail the working of a receiving set. The signal which is received is carried on a high frequency alternating current the amplitude of which is modulated under the control of sounds converted into electric currents by means of a microphone, and the strength of the signal depends upon the amplitude of the current so modulated. If its amplitude on reception is great, little or no amplification in the receiving set may be required. If its amplitude is small, very considerable amplification may be necessary. The signal after reception is impressed on the grid, and, by its pulsations, affects the flow of the stream of electrons passing from the cathode to the anode, so that it, or rather its image, is transmitted by means of that stream in a more or less amplified form, as the flow of that stream is increased or diminished. The rate of flow of the electrons from the cathode to the anode increases or decreases as the difference in potential between the anode and the cathode is increased or decreased, but not in exact proportion, because of the space charge, or repulsive effect of the electrons on one another as they issue from the cathode. The result is that, until the region of saturation is approached, each additional volt applied to the anode increases the flow of anode current by a greater amount than it was increased by the volt applied immediately before. The flow of anode current, however, depends not only on the voltage applied to the anode. It is affected to a greater extent by the voltage applied to the grid, and, in exactly the same way as occurs in the case of a change of anode voltage, the more positive the potential of the grid in relation to the cathode, the greater will be the change in anode current caused by the change of one volt in the potential of the grid. The signal is in the form of an alternating voltage, and, therefore, when it is impressed on the grid, either in addition to, or without the addition of, some polarising voltage, its pulsations affect the flow of the anode current and cause the grid to be at one time more negative than at another, according as that voltage is at its negative or positive phase. By this means the flow of anode current is increased or diminished, but, as explained above, this change in anode current is not exactly proportional to the change in grid voltage. The result is that the incoming signal is amplified to a greater extent when its fluctuations are at their positive, than when they are at their negative, phase, and some modulation distortion takes place. However, this is a matter of little moment when the incoming signal is weak, because the amplitude of the alternating voltage is small in comparison with the grid bias. When, however, the incoming signal is strong, the amplitude of the alternating voltage is a substantial fraction of the grid bias, with the result that the

positive half-cycle is amplified to a considerably greater extent than is the negative half-cycle. Consequently, a marked degree of modulation distortion is experienced. In a diode—that is, a valve containing two electrodes only—the rate of increase in the transmission by means of an increase in the potential difference between anode and cathode can be plotted and shown graphically as a curve. In calculating this curve, the cathode potential is assumed to be constant, whilst that of the anode changes.

Similarly, in the case of a triode, a curve called the transfer characteristic can be plotted, but in this case the curve is plotted with the anode and cathode potentials constant, and the curve shows the relationship between the steady anode current and the grid voltage when no incoming signal is being received. An example of this curve may be seen at p. 25a in Vol. V, and it will be observed that its slope—that is, the rate of change of anode current with grid voltage—varies from point to point. This ratio of change of anode current to the change in grid voltage is called the transconductance. Distortion results from working with a strong signal on that part of the characteristic where the curvature is greatest, which, in the case of a uniformly constructed grid, occurs when the transconductance is small.

The ultimate result looked for in a wireless receiving set is the production from the loudspeaker of a satisfactory output of sound, substantially the same in volume whatever may be the station from which it is desired to obtain signals, and however weak or strong the signals which reach the aerial of the receiving set. This requirement necessitates not only an ability to obtain sufficient amplification, but also the provision of means of varying that amplification to a greater or less degree, according to the strength of the signal received. From the time of its invention, in 1907, the triode valve provided adequate amplification, but before 1930 a number of different methods of varying the amplification had been adopted, some in the valve itself and some outside it. It is unnecessary to set them out, but one of those methods was to provide some means of altering the polarising voltage applied to the control grid of the tube, so that the amplification could be decreased or increased according to whether a strong or weak signal was received. Out of 86 firms of whom a list was given, two only adopted this method, although undoubtedly the sets of both were popular, and those of one pronouncedly so. If other methods of varying the amplification were adopted, the steady polarising voltage impressed on the grid was fixed, not variable at the will of the manipulator of the set. In practice it was generally fixed at a small negative figure—small, because when so fixed the amplification would be great, and modulation distortion avoided; negative, because to make it positive tended to attract the electrons from the cathode to the grid and to affect adversely the working of the grid circuit.

The fact that, with the grids then in use, distortion took place when the grid bias was made more negative in order to deal with a strong signal

was well known in 1930. The cause of this distortion was also well known in 1930, but no method of curing it had been discovered. In this country, however, this ignorance had not in practice caused any substantial inconvenience, because the strength of received signals was small, and, therefore, even in the case of the two sets which used variable grid bias to alter the amplification, there was little danger of working on that portion of the curve at which the curvature was greatest. Therefore the problem of avoiding distortion, even in those sets, was little, if at all, in men's minds in this country. However, as appears from Mr. Snow's original application, the problem does seem to have arisen in America at some date earlier than Mar., 1930. To this problem Mr. Snow set his mind, and he came to the conclusion that distortion could be cured, even where amplification was varied in the tube, by altering the grid bias. His conclusion was that to solve this problem it was necessary to produce a curve having three essentials, (i) a steep section, to give high amplification in the region of small grid bias, (ii) a long linear tail in the region of large grid bias, giving small amplification, and (iii) as gentle a curve as possible between them. The second desideratum was also required because in the reception of loud signals a slight change in the negative voltage of the grid would produce a large difference in the volume of sound unless the curvature in this region was very small. This undue sensitivity made it difficult to adjust the set with such accuracy as to produce the required volume. Mr. Snow found that such a curve could be produced by using a tube—new, I think, to him—containing an asymmetric grid to which the name variable μ tube has been given. Any kind of asymmetry appears to be covered. He gives as examples. tubes constructed with one or two gaps in the wire helix of the control grid, but variations in the relative distance between different parts of the cathode, anode and grid are equally covered.

Snow thereupon applied on Mar. 18, 1930, for protection for his tube in America. Later, letters patent were obtained here for a method of using the tube, and the first question which arises is what uses are covered. This depends on the construction to be put upon the English patent. Mr. Snow was in error in thinking that he had invented a new tube. It was accepted, for the purpose of argument in the case, that it had been anticipated by the patent of one Huth. Huth's patent was intended to be used as a discharge tube, and, as such, for amplification. He was not, however, concerned with altering or controlling the volume of sound, or with the amplifying power of the tube. Primarily, his object was as far as possible to lessen the effect of the difference in potential between the two ends of the cathode in a case where the cathode was directly heated and consequently there was a difference of potential between the two ends. That is to say, he wanted to make the transmission more symmetric, not less so. He does say, however, incidentally, that the difference may be accentuated, but he makes no claim in this respect. The Huth tube was never in fact manufactured, and, as the indirectly

heated cathode came into use shortly after, the invention lost its usefulness, since the difficulty it was designed to correct had been overcome. The respondents, however, say that Huth invented the tube, that its use was for amplification, that the use claimed by the appellants in their specification was also for amplification, and that therefore Huth had anticipated them. It is unnecessary to refer at this stage to another invention, that of Siemens and Halske, which was also to some extent relied upon as an anticipation, since the contention that that patent also was an anticipation adds nothing to the alleged anticipation by Huth.

The appellants, on their part, say that the claims in their specification are confined to the use of the valve with grid bias for volume control, and that the inventive step consisted in realising that the valve could be so used, and in working out the method and effects of its use. If the appellants by their specification claim the use of the valve for amplification generally, it is common ground that they have been anticipated, but, if they have limited their claim to the use they assert, they are right in saying there has been no anticipation. Indeed, the respondents accept the view that, if the patentee had limited the use claimed by appropriate wording in the specification, he could have made a claim which could not have been attacked on the ground of want of novelty.

The Court of Appeal have held that the use of the valve claimed in the appellants' specification is for amplification generally, and that therefore Huth's patent is an anticipation. What, then, is the true construction of the specification? The ultimate question is, of course, to determine the meaning of the claims, since from them must be gathered the field from which the public is excluded. If the claims have a plain meaning in themselves, then advantage cannot be taken of the language used in the body of the specification to make them mean something different. In the present case, however, I do not find myself capable of construing with certainty the claims apart from the explanatory matter contained in the body of the specification, though I should be inclined to read the words "adjusting the transmission" and "adjusting the said polarising voltage" in claim 1 as *prima facie* meaning "varying as required from time to time." I am content to say, however, that without further help the phrases are capable of more than one meaning.

I therefore feel myself compelled to analyse the wording of the body of the specification, and for that purpose I think that the vital portions are contained in p. 1, lines 12-93, p. 2, lines 17-29, and p. 4, lines 48-67. In this analysis I have confined myself to claim 1, to the validity of which the arguments before us were mainly addressed. Apart from the matter contained in the lines mentioned above and the claims, the rest of the specification is concerned with the working out of the principles involved, and with illustrations of its effect, matters which no doubt assist one in supporting or rejecting the meaning placed upon the vital wording, but do not themselves directly affect the meaning of the claims. I should

read the portions of the specification set out above as bearing the following meaning. The object of the invention is to provide a novel method of controlling amplification. Modulation distortion confines the reception of signals varying from weak to strong within a narrow range. High sensitivity is required for weak signals, and some method of reducing the amplification must be provided when stronger signals are received. A It is usual, as the signal strengthens, to alter the potential of one of the electrodes to a suitable figure, so as to reduce the amplification of the signal as it passes through the tube. When the potential is so altered, in order to maintain constant output from the loudspeaker, no modulation distortion takes place when weak signals are received, but it does take B place when stronger signals are received. Also, in the case of the stronger signals, the change of volume induced by the change in grid voltage is so rapid as to make the attainment of the required output difficult. Hence the permissible variation in the voltage of the grid for the purpose of controlling the amplification is very small. The invention proposes C to use a variable μ valve and to alter to the extent required the amplification of the received signal as it passes through such a valve by varying the potential of the grid.

The invention consists in altering in a tube the amplification of the passing signal so as to obtain the required output in the following way : D (a) by using a variable μ valve ; (b) by applying to the grid a steady potential ; and (c) by then altering that potential to the required figure, which shall never be so small as to prevent some current from passing. It is well known that the amplification of a tube may be controlled by altering the grid voltage to a required amount, the amplification decreasing E as this voltage becomes more negative. Transfer characteristics afford an indication of the amplification at different bias voltages. To my mind, the portion of the specification so analysed indicates that, when claim 1 speaks of "adjusting the transmission" and "adjusting the said polarising voltage," it means adjusting that voltage from time to time as F the strength or weakness of the received signal requires, and does not include a case where the grid voltage is fixed once for all, whether that fixing be done after due calculation or not until some experimental test has been made to find the best position on the transfer characteristic curve on which to work with the particular set, or type of set. G

The Court of Appeal has construed the method of control described in this claim as covering a case where the polarising voltage is first impressed and then altered, though the alteration takes place once only, or several times experimentally, and the grid bias is thereafter fixed, e.g., where the manufacturer impresses a polarising voltage and then, after ex- H perimenting to find the best position in which to fix it, does so fix it. The correctness or incorrectness of this construction depends on whether the words "varying the polarising voltage" and "adjusting the polarising voltage" may include a case where the voltage is altered once only, and then fixed, or whether they are confined to a case where it is left to the

user to vary the voltage from time to time, as circumstances require, so as to maintain a constant output from the loudspeaker, whatever the strength or weakness of the signal emitted from the station whose signals it is desired to receive. No doubt the words are capable of bearing the first meaning, though, even apart from their context, I should not myself
A so read them, but their present setting seems to me to point to the opposite conclusion. The whole of the wording appears to state as the object of the invention the maintenance of a constant volume of sound at the loudspeaker by altering the grid bias as occasion requires, and for that purpose to give a wide range to work upon, so that the receiver
B may have high sensitivity for weak signals and with greater signal strength may reduce the amplification without distortion, and thus control the amplification. Adjusting in this sense means altering from time to time to such a figure as the maintenance of a constant output or the obtaining of a required volume of sound demands.

C The later pages of the specification do not seem to me to modify this view. Indeed, they seem to strengthen it. Such expressions as "range of transmission," "amplification so adjusted as to bring the output down to a desired or standard level" and "adjusted to maintain a constant output signal" appear to show an intention, not to alter once,
D and then fix, the grid bias, but to have the capacity of altering it from time to time, so as to maintain the output required. However, similar expressions are to be found throughout the specification. In particular, there is the repetition of the word "control" in combination with the words "amplification" "transmission" or "volume." It is not
E "amplification," which is discussed throughout the document. It is the "adjustment," "regulation" or "control" of "amplification" which is sought. Nor do I think that the claim is extended by the so-called widening clauses. It is true that distortion which limits the range of continuous wave voltage is there referred to, but no one was able to
F suggest any practical application of the invention in the case of continuous waves, or anything to indicate that in such a case the grid bias was to be fixed after ascertaining by experiment or by calculation what voltage was to be impressed. Distortion hitherto, at any rate, is a matter of no moment in the use of continuous waves. In any case, in my view,
G as appears from p. 4, lines 63-67 of the specification, the invention is limited to amplifiers in which tubes are employed for amplification control. Having regard to the wording and expressed object of the specification as analysed above, I cannot think that the tubes can be said to exercise control upon the amplification, though no alteration in
H the grid bias is made, merely because the presence of the grid in the tube is necessary in order to obtain amplification.

It has been suggested in argument, and was, I think, accepted by the Court of Appeal, that the inventor imagined that he had invented a new type of tube, and that therefore, when he was claiming protection for its use, he might be expected to make the widest possible claim,

which, for radio purposes, may be said to be its use for amplification. That he thought the tube new seems to follow from his claim in the United States of America and from the use in the English specification of such words as "tubes constructed in accordance with the invention" and "tubes embodying the invention." He might well have made in this country a claim for its use for amplification generally, but the question is whether in fact he has done so, and, as I construe the specification, he has confined his claim to its more limited use for volume control. A

The language of the specification does, in my view, show with sufficient clarity that the patentee is claiming to protect the use of a variable μ tube in a case where the grid bias can be varied for the purpose of controlling the amplification, and is not claiming to protect its use for amplification generally. Having regard, then, to the construction which I put upon the claims after considering the specification as a whole, amplification control in this patent means, and means only, the method of controlling the amplification by changing the grid bias as occasion requires, and the invention has not been anticipated. B C

If, however, on its true construction, there has been no anticipation of the appellant's patent, the respondents contend that there is no subject-matter to support it. They say that there has been no inventive step. In their contention, anyone who was familiar with the progress which the art had made by Mar., 1930, and was desirous of avoiding modulation distortion when amplifying with grid bias volume control in a tube, had only to turn to two previous inventions in order to see at once how the difficulty might be surmounted. Those two inventions are that of Huth, mentioned above, and that of Siemens and Halske, No. 297,899, the convention date of which is Oct. 30, 1926. The argument is put thus. Long before 1930 it was known that with strong incoming signals distortion might occur where the amplification was varied by means of grid bias. The cause was also known—namely, that with the ordinary transfer characteristic it would be necessary with strong signals to work on the curved portion. It was also known that what was required in order to avoid distortion was to ensure that there should be no sharp curvature. To effect this purpose, one must have two ranges, a high amplification range and a low amplification range, joined together without a sharp curve. It was also known that certain tubes did in fact show a characteristic with a low amplification range, or, as it has been called, with a long tail, though the production of valves with such a characteristic was accidental, and the reason why they produced such a curve unknown. If, then, it is said, anyone interested in the art was endeavouring to find a cure for modulation distortion in a case where it was desired to alter the amplification by varying the grid bias, he would look for a valve with a characteristic showing a range to work upon which included a high amplification, a long tail, and as slight a curve between the two as possible. This valve he would find in the Siemens and Halske patent combined with a specification which speaks of "the characteristic line being asymptotic D E F G H

to the grid voltage axis," and of "single characteristics of which that corresponding to the greatest conductance passage extends very far into the negative and which added together give the desired shape of characteristic line," and which, in explanation of its language, gives illustrative figures showing such an asymptotic line. There is no doubt that the

A Siemens valve, like the Huth valve, is of a variable μ type, and the question is whether anyone familiar with the art, and having in mind the difficulty of using variable grid bias for volume control, and desiring to overcome it, would, on reading the Siemens specification, and examining its figures, inevitably see the solution. The question has produced

B diametrically opposed answers from the experts on either side. Professor Appleton, for the respondents, testified that, had he had the problem in mind and seen the Siemens and Halske specification, he would at once have said: "This is just what I want." However, he had not seen the Siemens specification, nor had he the difficulty in mind, and

C his evidence is an *ex post facto* inference as to the conclusion to which he would have come in circumstances which did not in fact exist. Dr. Eccles, for the appellants, on the other hand, said that he had seen Siemens' specification, but that it did not occur to him that anything in it was useful for distortionless volume control. Mr. Gill said that, even

D if he had been shown a valve with a grid having increasing spirals, and had been told that it produced a long-tailed characteristic, he would not have known it was suitable for grid bias volume control. Neither of these gentlemen, however, though they had either seen the Siemens specification or read about it, had had the problem in mind, and, as in

E the case of Professor Appleton, their evidence sets out what they thought their reactions would have been in 1930, rather than what they were. It is true that LUXMOORE, J., without reflecting in any way upon the evidence of Professor Appleton, preferred that of Dr. Eccles and Mr. Gill, but that finding is not conclusive, since the witnesses were speaking,

F not of fact, but of opinion, and ultimately it is for the tribunal to determine whether this solution was obvious or not, after informing its mind of the state of the art at the vital moment.

It was suggested on behalf of the appellants that prior to 1930 grid bias volume control was unpopular in this country because of the

G disadvantages of distortion, and that, as no one had solved the problem of avoiding it, notwithstanding the publication of Siemens' patent in Germany in 1926 and in this country in Jan., 1929, one might infer that the solution was not obvious. LUXMOORE, J., however, has found that the problem had not arisen as a practical problem in Mar., 1930. I

H should not myself feel justified in differing from that finding, but I think, nevertheless, that the argument should be allowed some weight, since the patent was originally applied for in America, and it appears from the specification itself that the problem had already arisen in the United States. The findings of LUXMOORE, J., are concerned solely with the state of affairs in this country. No doubt Siemens' specification

and figures would give assistance to one intent on combating modulation distortion, but a scintilla of inventiveness alone is required, and, if the patent is to be revoked, it must be shown that there is none.

Ultimately the conclusion at which any tribunal or member of a tribunal arrives in a matter of this sort must be largely personal, but before forming my own I have read and re-read the relevant evidence, with the result that I am satisfied that there was some inventive step. In reaching my conclusion, I have assumed the existence of a person anxious to solve the problem of how to obtain satisfactory volume control without distortion, and have assumed that he was familiar with the specifications of Siemens and Halske and of Huth. In considering the question, one is entitled, I think, to bear in mind that neither Huth's nor Siemens and Halske's valves had ever been constructed, and to remember the professed objects of both these patentees. Siemens and Halske's patent sought to save anode current and at the same time to avoid modulation distortion. It was meant (a) to be used solely in a push-pull circuit, (b) to be used at zero grid bias, (c) only to deal with the swing of the incoming signal about zero grid bias, (d) not to deal with varying input which may be at times very large and at times very small, (e) not to deal with high frequency amplification, and (f) to operate at low anode potential and low anode current. Nevertheless, though its object differed fundamentally from that of the patent in suit, it might suggest, to one who knew that a long tail and gentle curvature remote from the cut-off point were required to avoid modulation distortion, the possibility of solving the problem in a single high frequency valve. It might do so, but I do not think the solution obvious.

Dr. Eccles points out that the calculation of modulation distortion is extremely difficult, and, though Siemens and Halske do tell you that, if you have asymmetrical conductance passages, you get a long tail, and alter the transfer characteristic, they do not tell you how you alter it. Mr. Gill, as I understand him, says that even one of the figures from the original American patent in this case would not have suggested to him a method of getting a suitable curve for amplification of both loud and weak signals, because the amplification in that illustration would be small, and that, though the Siemens and Halske patent would tell him how to get a long tail, and perhaps a gentle curve removed some distance from the cut-off point, yet it would not indicate that at the same time he would get high amplification. Huth gives no characteristic curve, and the only hint of a solution is the suggestion that :

... the non-uniform distribution of voltage over the cross-section of the electron path can be made more non-uniform which in some circumstances in discharge vessels with two main electrodes without an auxiliary electrode can be very desirable for producing a rectifier effect.

The hint is so slight that it may well be neglected. No doubt in 1930 it was known that grid bias volume control led, or might lead, to modulation distortion in the case of the stronger signals. No doubt it was also

known that this was due to the curvature of the characteristic. Nevertheless, to know the problem and its cause is not to solve it. Another method of volume control might have been adopted, and, again, if grid bias had been chosen, it was still necessary to ensure a high and low amplification range, with a gentle curve, remote from the cut-off point, between them.

Siemens and Halske showed how to get a low amplification range, and possibly a gentle curve well removed from the cut-off, but their patent did not purport to deal with high amplification, and in any case it was intended for use in pairs of tubes at zero grid bias, and did not—at any rate, on first impression—inform the reader of the effect of working with a single valve and increasing the anode current to such an extent as to move the curve far to the left of that shown in fig. 7 in the specification. The object of Siemens and Halske is by the use of the pair of valves to get a resultant characteristic line which is steady, continuous and rectilinear through the whole of its length, not to get a high and low amplification range. It is in fact concerned with the tail end, not with the head. Even if the problem were approached by one who knew all that Siemens and Halske could tell him, there is still the inventive step of realising that the same curve which is useful for obtaining a rectilinear characteristic in a push-pull connection will give the desired characteristic in a single tube. On the evidence, as I understand it, I accept the view that some imagination and a great deal of experiment and calculation were required before it was ascertained that the use of a variable μ valve with grid bias volume control would prevent undue modulation distortion. Indeed, until the patent in suit, there was no quantitative knowledge of the effects of using a variable μ valve, and some of those effects—namely, the discovery, shown in fig. 3 of the specification, of the existence of two danger points—were a matter of surprise. It is easy for one not skilled in the art to see invention in a device which to the skilled mind is obvious. It is also easy after a discovery to say that the device is, and always has been, obvious. Informing my mind, however, so far as I am able, by the expert evidence given before LUXMOORE, J., I am of opinion that an inventive step was required.

If they fail upon the pleas of want of novelty and subject-matter, the respondents rely upon the contention that the patent was a convention patent granted under sect. 91 of the Act, and that under sect. 25 (e) the invention claimed in the complete specification is not the same as that for which protection was applied. In the present case, the protection applied for is that contained in Snow's application, dated Mar. 18, 1930. Whether that patent was ever granted in the United States of America is not in evidence. Moreover, it is immaterial, since *application* in the foreign country, and not *grant*, is all that is required. The argument proceeded on the basis that the American application was for protection for a tube with an asymmetric grid exercising different

rates of control upon the electron stream passing from cathode to anode, whereas the English patent was granted for the use of such a tube with grid bias for volume control. For the appellants, it was said that the American application was for protection in respect of the tube, and for its use for amplification control, and that therefore the English patent was the same invention as that for which protection was applied for in America. For the respondents, it was argued that the inventive step in America was the idea of a variable μ tube, whereas in England that step was not novel, and that the invention consisted in the conception of using that tube with grid bias for volume control—in other words, that in England a new inventive step was required. A B

It was conceded by the respondents that the American patent covered both the tube and its use for amplification generally, and it is, I think, plain from the American application that the tube was intended to be used, not for the purpose of amplification only—a purpose already provided for by what is called “the known type of tubes”—but also for that of controlling the amplification by means of grid bias and thereby avoiding modulation distortion. Mr. Snow says : C

An object of the present invention is to provide a vacuum tube having such operating characteristics that no distortion is introduced when, for increasing signal strengths the operating potentials are so adjusted that the amplification rate is reduced to a small fraction of the maximum amplification. A further object is to provide a vacuum tube having such characteristics that, when the potentials are adjusted to give a relatively low amplification of strong signals, the change in the transconductance for a given change in the gain voltage is much lower than is the case with the known type of tubes. A further object is to provide a vacuum tube capable of adjustment to give an undistorted output of approximately constant magnitude over a wide range of applied carrier voltages. D

That the adjustment referred to meant a change in the grid bias voltage appears from the later statement : E

It is well known that the amplification of a vacuum tube may be regulated by adjusting the bias voltage upon the control grid, the amplification decreasing as the bias voltage becomes more negative.

If these passages are read together, they appear to indicate that the primary use of the tube was for grid bias volume control. Indeed, the whole object of the American invention was to use grid bias volume control in a tube which would avoid modulation distortion. F

It is true that in the American specification the claims at the end of the document ask only for protection in respect of the tube itself, but the body of the specification shows that the intended use of the tube is to control amplification by means of grid bias. Protection for that use is what the inventor requires. Indeed, for amplification only, the symmetrical type of tube is at least as good as the asymmetric, and, unless the formal claims alone are to be taken into consideration, the wording of the specification as a whole shows, to my mind, an intention to apply for, and in substance contains an application for, such protection. It is, I agree, essential that the intended use for which protection is sought should be set out in such terms as to indicate that application is being made for its protection, but, to achieve that result, G H

in my view, reliance may be placed on the rest of the document, in addition to the formal claims. If the views which I have expressed as to novelty and subject-matter be right, Mr. Snow invented the use of the variable μ tube for amplification control, and explained that method of use in some detail. In such a case, I think, the whole of the document
A must be considered in determining for what invention in substance protection is being applied for. If, then, in America, protection has been applied for for the use of the tube, with grid bias for volume control, and if the invention claimed in the complete specification in England be, as I think it is, the use of the tube with grid bias for volume control,
B then the English invention is the same as that for which protection was applied for in America.

In argument before us, both sides adopted the view of the law as stated in *Andreas' Application* (5), and I accept the view that this statement accurately sets out the law to be applied. In that case, LUXMOORE, J.,
C refused to accept the doctrine of legitimate development as applicable in determining whether an invention, for which a convention patent has been obtained, is the same as that for which protection has been applied for in the foreign country. However, no question of legitimate development arises here. The sole question is whether or not protection
D was applied for in America for the limited use of the tube. I do not think that there is any disconformity.

Finally, it is said on behalf of the respondents that the invention is bad for ambiguity. By sect. 25 (2) of the Act, a patent may be revoked on the ground that (*h*) the complete specification does not sufficiently
E and fairly describe and ascertain the nature of the invention and the manner in which the invention is to be performed, and that (*i*) the complete specification does not sufficiently and clearly ascertain the scope of the monopoly claimed. The respondents claimed that the patent in suit should be revoked on both these grounds. In their contention, the
F specification offended against both requirements, for two reasons, (*i*) that no limits were set to, or required in, the asymmetry of the grid, and (*ii*) that no quantitative measure of grid bias was stipulated for. Consequently, they said (*i*) that the grid might be constructed with so narrow helices, and so little difference between them, that no effect in the
G "tail" would be produced, or of so wide a spacing that the tube would give no amplification, and (*ii*) that so little grid bias might be provided in the set that the tail could not be used. On the construction of the specification adopted by LUXMOORE, J., say the respondents, the inventor set out to get volume control without distortion by use of a
H variable μ valve, whereas what he claimed is the use in association of any asymmetric valve with any degree of grid bias, and he failed to explain the construction of the valve and limits of its use. I am not sure that this argument is not more forcibly directed to supporting the respondents' contention on construction than to an attack on its clarity. Indeed, it is so used in the summary of the respondents' contentions on

construction which was handed to this House during the hearing. However, if it provides an objection to the validity of the invention on other grounds, there is no reason why it should not be so used.

The appellants reply that the avoidance of distortion has never formed part of their claim. They claim, they say, the use of grid bias with an asymmetric tube for amplification control. It is true that that use is intended to, and will in fact, avoid undue distortion, but that is not the invention. It is an advantage accruing from its use.

In this view, as they maintain, it is not necessary to specify some particular asymmetry in the tube. Any asymmetry will do—e.g., any of the devices suggested in the Siemens and Halske specification, and any asymmetry will make some improvement. Nor need any range of grid bias be specified. In fact, no electrical engineer, if constructing a valve with a long tail, would fail to provide sufficient grid bias to make use of it, but in any case the mere failure to provide means to enable the user of the set to use it to the best advantage would not invalidate the patent. It is still useful for amplification control, and to support the invention no particular degree of usefulness is required. Some utility is, indeed, demanded—sect. 25 (2) (g)—but it may be very slight, and is to be found in the invention in the fact that it is always useful, and does in certain cases provide a great advantage. If the inventor had claimed that in all circumstances he avoided modulation distortion, and did not do so, no doubt his invention would lack utility for the purpose indicated by him. However, he has not indicated that object as part of the claim, though in the body of the specification he has set out that result as following from the use of his invention.

I agree with the appellants' contentions. If the use claimed be, as I think it is, for the use of the valve with grid bias for volume control, then the invention fulfils its function, and is bad neither for ambiguity nor for want of utility. The specification might, no doubt, be expressed in clearer language, but the expression of scientific achievement in words is often difficult, and if, in addition to the difficulty of invention, there be imposed upon the inventor the necessity of draftsmanship legally precise in all its details, the wording of a specification in a complicated matter with sufficient accuracy to maintain the patent will, I fear, be no light task. LORD HALSBURY, L.C., in *Tubes, Ltd. v. Perfecta Seamless Steel Tube Co., Ltd.* (7), expressed the outlook for which I am contending in words which with slight alteration might be applied to the present case. He said, at p. 96 :

I think, in looking at this specification, it is impossible not to recognise the fact that there are difficulties in the use of human language which become aggravated when you are dealing with complex machinery ; and, indeed, unless the patent law allowed people to eke out their descriptions by giving plates and pictures of what it is they do, I should think in some cases it would be almost hopeless to expect that you could, with sufficient precision, mark out the boundaries of thought for that which you intended to claim as the subject-matter of your invention. I doubt whether anyone of us has not more than once found that human language is but an imperfect instrument for the expression of human thought ; but when you are dealing with complex machinery of this character, it is impossible, to my mind,

to give adequate expression to the things you are endeavouring to describe without having before your mind the very nature of the machine with which you are dealing. For that reason you must look at the specification as a whole and see what that specification means.

My Lords, it is with such considerations in mind that I have ventured to paraphrase a portion of the specification and to make some short references to the working of a wireless receiving set. Inadequate I recognise both paraphrase and references to be, but to me they afford the best method of looking at the specification as a whole and of seeing what it means. I would allow the appeal, and restore the judgment of LUXMOORE, J.

Appeal dismissed with costs.

Solicitors: *Broad & Son* (for the appellants); *Bentleys, Stokes & Lowless* (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

WEMBLEY CORPORATION v. SHERREN.

[KING'S BENCH DIVISION (Finlay, L.J., sitting as an additional judge),
October 21, 1938.]

Landlord and Tenant—Agricultural holding—Clause giving right to determine lease on one month's notice—Land required for open space—Construction—Agricultural Holdings Act, 1908 (c. 28), s. 22.

The defendant was tenant of a property under a seven years' lease which expired in 1911, and thereafter, by holding over, he became a tenant from year to year. The lease contained a clause giving the lessor the right, in the event of the property being required for (*inter alia*) a public purpose, to determine the tenancy on giving the tenant one month's notice. The plaintiffs, who became the reversioners, required the property for an open space, and, in accordance with the above clause, gave the defendant one month's notice. The defendant refused to give up possession, contending that the clause was not applicable, by reason of the provisions of the Agricultural Holdings Act, 1908, s. 22, and that in any event it should be construed to ensure that the term should end on the last day of a year of the tenancy:—

HELD: (i) the provision for six months' notice contained in the Agricultural Holdings Act, 1908, s. 22, applied only to cases where by law a half-year's notice was necessary and sufficient, and in this case the clause in question did apply.

(ii) read fairly, the clause operated to enable the plaintiffs to give notice at any time.

[EDITORIAL NOTE.] By the Agricultural Holdings Act, 1923, s. 25, a local authority may give notice to an agricultural tenant in the circumstances of this case. Also, notice may be given by any landlord in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the land for some specified purpose, not being agriculture. In neither of these cases is it stated whether the notice must be one terminating at the end of a year of the tenancy, and it would seem that, although in this case the question has been argued with reference to the Agricultural Holdings Act, 1908, s. 22, the decision is applicable to a notice given under the 1923 Act.

AS TO NOTICE TO QUIT AN AGRICULTURAL HOLDING, see HALSBURY, Hailsham

Cases referred to :

- (1) *Lowther v. Clifford*, [1927] 1 K.B. 130; Digest Supp.; 95 L.J.K.B. 576;
135 L.T. 200.
- (2) *Lewis v. Baker*, [1906] 2 K.B. 599; *31 Digest 51, 1988; 75 L.J.K.B. 848;
95 L.T. 10.
- (3) *Soames v. Nicholson*, [1902] 1 K.B. 157; 31 Digest 440, 5860; 71 L.J.K.B.
24; 85 L.T. 614.

ACTION for recovery of a farm property which the plaintiffs required
as an open space. The facts and arguments are fully set out in the
judgment.

W. E. P. Done for the plaintiffs.

C. R. N. Winn for the defendant.

FINLAY, L.J. : This case has been extremely well argued. It is a
small case, and a case in which, in spite of the able argument by counsel
for the defendant, I have arrived at the conclusion that the plaintiffs
are entitled to succeed. As it is an important point, I will go into the
matter, but not at very great length. In 1904, there was a lease of a
farm for 7 years from 1904. That lease contained a clause which—in
the main, at all events—I will read. It is cl. 10 :

If at any time during the continuance of the said term hereby granted the said
demised premises or any part or parts thereof shall be required for the purpose of
any railway or public undertaking or for building purposes or for any other than
agricultural purposes then the lessor shall be at liberty to determine the present
demise and the term hereby granted or so far only as regards the term in respect of
the land and premises so for the time being required as aforesaid as the lessor may
think proper upon giving to the lessee or leaving at his usual place of abode one
calendar month's previous notice in writing and thereupon this present lease or so
far only as regards the term in the land and premises which may be so required as
aforesaid as the case may be shall cease and determine the lessee being allowed a
fair abatement of rent.

What has happened is this. This land was required by the plaintiffs,
the Wembley Corporation, for an open space and for the public service.
The Wembley Corporation are now the reversioners. At the end of the
lease, which came to an end in 1911, the tenant held over. It is quite
clear that the tenant held over, at all events when the rent was paid and
accepted. Then he held over as a yearly tenant, and thereupon he held
over on the term that, so far as applicable, the terms in the lease should
continue to apply. I will refer to a passage which is expressed very
clearly in the judgment of SARGANT, L.J., in *Lowther v. Clifford* (1), at
p. 149 :

The rule of law in such cases is well settled, and is that the tenant is deemed to
hold on the terms of the original letting, so far as these terms are not inconsistent
with an annual tenancy.

There appear to be two points here. The first is whether this term
continues to be applicable—that is to say, whether it was a term which,
as it certainly applied during the original letting, now applies during the

tenancy from year to year. The second point is what is its construction if it does apply. As to the first point, Mr. Winn made a very ingenious argument. The Agricultural Holdings Act, 1908, s. 22, is in these terms :

Where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient for the determination of a tenancy of a holding from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for such a determination, unless the landlord and the tenant agree in writing that this section shall not apply, in which case a half year's notice shall be sufficient. . . .

I think that Mr. Done's main answer to that was a good one. He said, and I think rightly, that that has no application to a case such as the present, where there is an express term. The truth of the matter is that it is obviously intended to apply, and does apply, only to cases where by law a half-year's notice is necessary and sufficient. That, I think, cannot affect a clause such as the present one. The point, anyhow, would be a somewhat artificial one, by reason of the fact that Mr. Winn candidly said that the law was altered in 1923, and that only a technical difficulty remained if Mr. Winn's point was right in view of that alteration. I do not think that that point is a good one. If that is right, one comes to the question of construction. Mr. Winn asked me to say that, assuming that the clause was effective, it ought to be so construed as in any event to ensure that the term ended on the last day of the tenancy year, and he referred me to two cases, to one of which I should make reference. I will for convenience take the case of *Lewis v. Baker* (2). I think that, when those two cases are looked at, they cannot operate to induce me to construe the clause in the manner in which Mr. Winn suggests that I ought to construe it. I do not think that there is any difficulty about the construction of this clause. If I rightly followed Mr. Winn's argument, it was this. He said that, if at any time during the continuance of the said contract it is agreed that there is fixed, so to speak, a moment of time at which the land was required for the purpose of a public undertaking, then thereupon they shall be at liberty to determine the tenancy. I pointed out that he could not very well determine it at the instant at which the land did become wanted for public purposes. He said that there was really no time, so to speak, fixed, and that the only way effect could be given to the matter was that it should be determined at the end of the year. I do not think that that can be the meaning of the clause. I think that the parties meant that, if the land was wanted for these purposes, then one month's notice could be given at any time, to end at the end of the one month, and that that was a sufficient notice. I cannot think that it would be possible to read this clause in any other way. I think, in the first place, that the clause does apply, and that it falls within the general principles which are stated in the judgment of SARGANT, L.J.

In the second place, when one reads it fairly, it operates so as to enable the plaintiffs to give the notice at any time, the notice being a monthly notice. I should add that no authority seems to exist on the point, but I have been much assisted in the conclusion at which I have arrived by

Soames v. Nicholson (3), an authority which seems to me to be closer to the present case than is any of the other authorities. For these reasons—I am much indebted to the very able arguments of counsel—I decide this case in favour of the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *K. E. Tansley*, Town Clerk, Wembley (for the plaintiffs); *Champion & Co.*, agents for *Turberville Smith & Co.*, Uxbridge (for the defendant).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

DANIELS AND DANIELS v. R. WHITE & SONS, LTD., AND TARBARD.

[KING'S BENCH DIVISION (Lewis, J.), November 2, 3, 1938.]

Sale of Goods—Sale of lemonade containing poison—Liability of retailer—Implied conditions—Sale for particular purpose—Sale by description—Merchantable quality—Liability of manufacturers—Fool-proof process with adequate supervision—Sale of Goods Act, 1893 (c. 71), s. 14 (1), (2).

A husband and wife sued the manufacturers and the retailer of a bottle of lemonade for damages for injuries received by reason of the fact that the bottle contained 38 grains of carbolic acid in addition to the lemonade. Both plaintiffs, in suing the manufacturers, relied upon the doctrine enunciated in *M'Alister (or Donoghue) v. Stevenson* (1). The husband, who in fact purchased the bottle of lemonade, in suing the retailer alleged that the implied conditions as to quality and fitness in the Sale of Goods Act, 1893, s. 14, had not been fulfilled. It was found as a fact that the manufacturers, by adopting a fool-proof process and by carrying out that process under proper supervision, had taken reasonable care to see that there was in the lemonade no defect which would injure the plaintiffs. It was also found as a fact that the husband asked for and received a bottle of the manufacturers' lemonade, mentioning the manufacturers by name:—

HELD: (i) the duty owed by the manufacturers to the consumer was not to ensure that their goods were perfect, but merely to take reasonable care to see that no injury was done to the consumer or ultimate purchaser, and this duty they had completely fulfilled.

(ii) the husband did not, in the circumstances, rely upon the skill or judgment of the retailer, and could not recover under the Sale of Goods Act, 1893, s. 14 (1), but there was a sale by description, and, therefore, a breach of the implied condition that the goods should be of merchantable quality, and he could recover under the Sale of Goods Act, 1893, s. 14 (2).

EDITORIAL NOTE. The case of *M'Alister (or Donoghue) v. Stevenson* (1), now so often relied upon, was an appeal from Scotland, and was brought upon an interlocutory proceeding before the evidence in that case had been heard. The opinions given in the House of Lords, therefore, deal only with the law on the point, and not with the application of the law to the facts of that case, or, indeed, of any case. We have herein the consideration of the application of this doctrine to the facts of a modern factory, and it is held that, where a manufacturer adopts a fool-proof process carried out under efficient supervision, his duty under the doctrine is fulfilled. It would seem that the plaintiff is ultimately forced to show that there is some possibility that the danger to himself was caused by some error or omission on the part of the manufacturer.

AS TO THE APPLICATION OF THE DOCTRINE IN *M'Alister (or Donoghue) v. Stevenson*, see HALSBURY, Hailsham Edn., Vol. 23, pp. 632-634, para. 887; and FOR CASES, see DIGEST, Supp., Negligence, Nos. 364a-364f.]

Cases referred to:

- (1) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
(2) *Morelli v. Fitch & Gibbons*, [1928] 2 K.B. 636; Digest Supp.; 97 L.J.K.B. 812; 140 L.T. 21.

ACTION for damages for negligence by the defendants in supplying a bottle of lemonade which in fact contained carbolic acid.

The facts are fully set out in the judgment.

B *John Busse* for the plaintiffs.

G. Russell Vick, K.C., and *P. L. E. Rawlins* for the first defendants.

L. K. A. Block for the second defendant.

LEWIS, J.: The first plaintiff, Mr. Daniels, is a street trader. He
C hawks and trades in secondhand clothing and secondhand furniture. Mr. Daniels claims damages for negligence against R. White & Sons, Ltd., who are manufacturers and bottlers of, amongst other things, lemonade. The second plaintiff, his wife, also claims damages for negligence against R. White & Sons, Ltd. The negligence alleged is that
D the defendants, in breach of the duty which they owed to the plaintiffs, supplied a bottle of lemonade which in fact contained carbolic acid. The bottle of lemonade was in fact obtained by the male plaintiff from a Mrs. Tarbard, the licensee of a public-house known as the Falcon Arms, Falcon Terrace, Battersea, in the county of London. Both
E plaintiffs allege as against the first defendants, who are, as I say, manufacturers and bottlers, that they did not exercise reasonable care as manufacturers to prevent injury being done to the consumers or purchasers of their wares. The male plaintiff also sues Mrs. Tarbard, from whom the bottle of lemonade was actually obtained, alleging, first of all,
F that, under the Sale of Goods Act, in the circumstances there was an implied warranty that the lemonade was reasonably fit for the purpose of drinking, that it contained no deleterious and noxious matter, and/or that it was of merchantable quality, relying, as I read that plea, upon the Sale of Goods Act, 1893, s. 14 (1), (2).

G On July 23, the male plaintiff, who was a customer of the Falcon Arms, went into the Falcon Arms at about 7 p.m. with a jug, in order to purchase a jug of beer, and, as he said, a bottle of R. White's lemonade, which is the lemonade made and bottled by the first defendants. He says that he prefers that particular lemonade, and that it was his usual
H order. He is a perfectly sober gentleman, and no suggestion of any kind is made against him. On the evidence given by himself, and also on that given by Mrs. Tarbard, it is quite clear that sometimes three times a week he used to go in the evening for a jug of beer and a bottle of lemonade. "On this occasion," he said, "I asked for R. White's

lemonade." Mrs. Tarbard corroborated that, and said: "Oh yes, he came in, and he asked for R. White's lemonade." I accept that evidence. Having obtained his jug of beer and his bottle of lemonade, he then proceeded quite a short distance to his own home. It was a very hot day. On arriving home, the first thing he did was to take out the stopper of the lemonade bottle, having first of all torn away the paper label which was stuck over the top of the bottle, which paper label I find was intact when it was sold to him. Having opened the bottle, he then poured a little lemonade into the jug of beer. He also poured some of the lemonade into a glass, which his wife then immediately drank, and he also drank some lemonade. He did not drink out of the jug of beer into which, as I say, a little of the lemonade had been poured, but he said he was very thirsty, and he had a drink. Both husband and wife drank almost simultaneously, and they both immediately realised that there was something burning in the liquid which they had taken, and they at once thought they had been poisoned. I need not go into the details, but in fact it was estimated, on an analysis of what remained in the bottle, that that bottle of lemonade contained 38 grains of carbolic acid, and that would amount to half-a-teaspoonful. The remains of the contents of the bottle, when analysed, were 4.2 oz., and in that 4.2 oz. there were 8 grains of carbolic acid. The analyst has worked it out as a mathematical calculation, and has therefore estimated that there were in the bottle at the time 38 grains of carbolic acid.

That was the case for the plaintiffs, and at the end of the plaintiffs' case a submission that there was no case to answer was made to me by counsel for the first defendants. The position was this. After a certain discussion for the purpose of the submission, it was said that they had to assume and accept that here was a bottle which, when purchased, quite properly had its stopper in, and also had the label pasted over the top, but which, on the evidence called by the plaintiffs at that stage, contained carbolic acid, and that, as a result of drinking the contents of the bottle, the two plaintiffs had suffered damage. That, said counsel for the first defendants—and he said it quite accurately—is the only evidence in the case. He prayed in aid a statement which is to be found at the end of the opinion of LORD MACMILLAN in *M'Alister (or Donoghue) v. Stevenson* (1), in which, said counsel, LORD MACMILLAN was saying that those facts are not sufficient to establish a *prima facie* case. LORD MACMILLAN said, at p. 622:

The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, *res ipsa loquitur*. Negligence must be both averred and proved. The appellant accepts this burden of proof, and in my opinion she is entitled to have an opportunity of discharging it if she can.

It was argued by counsel that LORD MACMILLAN was saying that it is

not sufficient to say : Here is an article which is defective and has caused injury to the plaintiff. It is not sufficient to say that carbolic acid is not found in bottles of lemonade unless someone has blundered. The plaintiff must go further, and must prove that the carbolic acid has got into the bottle because the defendant has not taken reasonable care to keep it out.

A I do not propose to discuss the point at length—it would not become me to criticise LORD MACMILLAN—but I think that it is said that that was *obiter*, and was not necessary for the decision of that case in their Lordships' House, and that the only question which they were deciding then was : What was the duty owed by a manufacturer of certain consumable goods to an ultimate purchaser or consumer ? It was not necessary to go into the facts of that particular case, because the case had never been before the courts on the facts at all, and it is therefore suggested by counsel for the plaintiff that LORD MACMILLAN did not mean to include all such cases in the passage to which I have referred. He points out that it would cast a very great onus upon the consumer who has been poisoned in a case where an article is enclosed in a container sealed up and rendered quite impossible of interference when it leaves the factory, and which, when opened, is found to be poisoned. It is said that, in such a condition of things, the plaintiff cannot possibly, in 99 cases out of 100, say anything more than this : “ Here is a sealed container, and it is so sealed that it cannot be possibly opened or tampered with. It purports to contain food for human consumption, and it turns out to be full of poison. I cannot go to the factory and say, ‘ You did not do something which you ought to have done, or you did something which you ought not to have done.’ That ought to be a sufficiently *prima facie* case on the doctrine of *res ipsa loquitur*.”

I did not stop the case, because I thought that it was right to hear what the defendants had to say. Counsel for the plaintiffs addressed me, and, as he always does, dealt most efficiently with the facts of the case and the evidence. He said that the defendants, upon the hypothesis that they had to rebut any inference of negligence which there might be, had entirely failed to do so. I do not take that view. I have to remember that the duty owed to the consumer, or the ultimate purchaser, by the manufacturer is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect that is likely to cause such injury.

H I listened yesterday to a description of the machinery and the method used in these works in dealing with these bottles. The empty bottles are brought in, I dare say, from many parts of London. They are brought, it is true, into the same building and into the same room where the washing and filling of bottles is eventually done. Mr. Busse has questioned the propriety of a state of things in which bottles which may come from anywhere, and which may contain poisonous matter, are in

the same room in which the washing and the filling takes place. What happens is this. The bottles are brought in. There is a trolley alongside the girl who has to sort out the bottles. It is her duty to look at the bottles and smell them, and, if she finds any bottle with an unpleasant smell, either from poison or from anything else, that bottle is immediately put on the trolley, and at the end of the day is taken away and broken, so as not to be used again. The girl having satisfied herself by her sense of smell and by the general look of the bottle that the bottle is innocuous, it then goes to the washing machine, and there, I am quite satisfied, that bottle has the most thorough washing that any bottle could have. It is washed at least three times. It has a 30-seconds' rinse first of all in hot water. Then it has another rinse in caustic soda at a heat of 130°F. Then it has another rinse in exactly the same process in cold water from the main. The bottles, while this is happening, are inverted—namely, with their necks down—and the washing is done under pressure by a jet. It stands to reason that, if one of these bottles by any chance escapes the nose of the lady who smells it first of all, it is then placed upside down on the carrier which conveys these bottles to the washing, and, if there were half-a-teaspoonful, or, indeed, any amount, of liquid in the bottle, it would of course fall out before the bottle was ever washed at all. During the washing process the bottle is not handled at all, and, when it comes to the end of the carrier washed, the only handling it then receives is to remove it from the carrier and to place it on the machine which fills it. Then it is taken off and the stopper put on.

That method has been described as fool-proof, and it seems to me a little difficult to say that, if people supply a fool-proof method of cleaning, washing and filling bottles, they have not taken all reasonable care to prevent defects in their commodity. The only way in which it might be said that the fool-proof machine was not sufficient was if it could be shown that the people who were working it were so incompetent that they did not give the fool-proof machine a chance. It is pointed out quite rightly by Mr. Busse that the question of supervision comes in. If you have 16 girls doing this process with no supervision of their work, of course all kinds of accidents may happen. A bottle may get to the filler without ever having been washed at all. A girl may upset a bottle just after it has been filled. She finds, let us say, that two teaspoonfuls of the liquid have been poured out. She has to fill it up from somewhere, so she walks along to the trolley where the dirty bottles have been put, picks up the first bottle she sees there, and pours the contents into the lemonade. Of course, that would be a rather curious thing for anyone to do, but it is a possible thing to happen if there is no supervision in this process.

I am satisfied in this case that there is supervision. I have had called before me the works manager who has charge of all three factories. That means, of course, that he is not at one factory the whole time, but he has described to me what takes place in this particular factory, and I am

satisfied that there is quite adequate supervision. Even if the true view be that there was here a case for the defendants to answer, I am quite satisfied that they have answered it, and that the plaintiffs, as a result, have entirely failed to prove to my satisfaction that the defendant company were guilty of a breach of their duty towards the plaintiffs—
A namely, a duty to take reasonable care to see that there should be no defect which might injure the plaintiffs. For that reason, I think that the plaintiffs' claim against the first defendants fails. I have not forgotten, as Mr. Busse in his argument pointed out, that there was called from this factory nobody who was doing the mixing, and no foreman.
B I am quite satisfied, however, on the evidence before me, that the work of this factory is carried on under proper supervision, and, therefore, that there has been no failure of the duty owed by the defendant company to the plaintiffs.

With regard to the other defendant, I confess that there is one consideration which ought really perhaps to be taken into account, and that is this. She was, of course, entirely innocent and blameless in the matter. She had received the bottle three days before from the first defendants, and she sold it over the counter to the husband, and the husband, of course, is the only one who has any rights in contract and breach of
D warranty against her. There is no issue of fact between the husband and Mrs. Tarbard. They entirely agree as to what happened—namely, that Mr. Daniels came into the public-house, the licensed premises, and said, "I want a bottle of R. White's lemonade," and R. White's lemonade was what she gave him. The question which arises is, on those facts,
E the bottle in fact containing carbolic acid, and, the lemonade, therefore, not being of merchantable quality, whether or not the second defendant is liable.

To my mind, it is quite clear that she is not liable under sect. 14 (1) of the Act, because Mr. Daniels did not rely upon her skill and
F judgment at all. He asked for and obtained exactly what he wanted. If a man goes in and asks for a bottle of R. White's lemonade, or somebody's particular brand of beer, he is not relying upon the skill and judgment of the person who serves it to him. In spite of the argument which has been put forward by counsel for the second defendant, I
G have some difficulty in seeing—particularly in view of the cases which have been cited to me, and more particularly *Morelli v. Fitch & Gibbons* (2)—why this was not a case of sale by description within the Sale of Goods Act, 1893, s. 14 (2). If it is a case of goods sold by description by a seller who deals in goods of that description, there is an
H implied condition that the goods shall be of merchantable quality. Unfortunately for Mrs. Tarbard, through no fault of hers, the goods were not of merchantable quality. It was suggested by Mr. Block that there was an opportunity of examination so as to bring the matter within the proviso to sect. 14 (2) of the Act, and he cited an authority to me, but I do not think that that authority takes him the length which

he would wish it to do. I therefore find that this was a sale by description, and therefore hold—with some regret, because it is rather hard on Mrs. Tarbard, who is a perfectly innocent person in the matter—that she is liable for the injury sustained by Mr. Daniels through drinking this bottle of lemonade. However, that, as I understand it, is the law, and therefore I think that there must be judgment for Mr. Daniels, who is the only person who can recover against Mrs. Tarbard. A

Judgment for the male plaintiff against the second defendant for £21 15s., and judgment for the first defendants against both plaintiffs. Costs on the High Court scale.

Solicitors: *Arthur Dollond & Co.* (for the plaintiffs); *Wm. Webb & Sons* (for the first defendants); *Crossman, Block & Co.* (for the second defendant). B

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

TATE v. TATE. C

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **June 15, November 4, 1938.**]

Divorce—Desertion—Clear case of initial desertion—Subsequent deed of separation—Repudiation of deed. D

In Apr., 1931, the respondent, the husband, treated the petitioner in such a way as to terrify her, and she went back to her mother. She returned to see the respondent, but, in effect, he told her to clear out. In June, 1931, a separation agreement was entered into between the parties. The husband paid about £6 under the deed, and in Oct., 1931, disappeared. The petitioner had since then supported herself and her child:— E

HELD: upon all the facts, and particularly having regard to the fact that the initial break-up of the home was due to an act of desertion on the part of the respondent, there was such desertion on the part of the respondent as would support a petition for divorce founded on desertion for a period of more than three years immediately preceding the presentation of the petition. F

[EDITORIAL NOTE. It will be seen that it is felt that the older cases on constructive desertion may not be quite in point when considering that question for the purpose of a decree of divorce founded on desertion. In the present case, there is a clear case of initial desertion, and the only question is whether a deed of separation not acted upon had put an end to that desertion. G

AS TO DESERTION AND SEPARATION DEEDS, see HALSBURY, Halsham Edn., Vol. 10, p. 657, para. 966; and FOR CASES, see DIGEST, Vol. 27, pp. 317, 318, Nos. 2940-2956.]

Case referred to:

(1) *Ratcliffe v. Ratcliffe*, [1938] 3 All E.R. 41; Digest Supp. H

UNDEFENDED PETITION by the wife for the dissolution of the marriage on the ground of desertion by the husband without cause for a period of three years immediately preceding the presentation of the petition within the Matrimonial Causes Act, 1937, s. 2 (b).

Theodore Turner for the petitioner.

BUCKNILL, J. : This is a petition by Mabel Jessica Tate for the dissolution of her marriage to Robert Widrington Tate on the ground that the husband has deserted the petitioner without cause for a period of three years immediately preceding the presentation of this petition. The petition was filed on Feb. 3, 1938. The respondent has appeared to the petition, but has not filed any answer nor taken any part in the proceedings. The parties were married in Feb., 1922, and there is one child of the marriage, born in June, 1927. The case came before the court originally in June, 1938, as an undefended cause. The wife petitioner was called as a witness, and she proved to my satisfaction that the husband had behaved to her in such a way as to constitute desertion on his part in Apr., 1931. He treated her in such a way as to terrify her and make her afraid of him, and she had to go back to her mother. Then she went back to the house to see him, and he practically told her to clear out. In June, 1931, a separation agreement was signed by both the parties. That states in its preamble that unhappy differences have arisen between the husband and the wife and that they have both accordingly agreed to live separate and apart for the future. Then they enter into the following terms. They agree to live separate and apart from each other, and agree that neither of them will molest, annoy or interfere with the other, and the husband will pay to the wife the sum of £1 per week for the maintenance of herself during their joint lives and 10s. per week for the maintenance of their child, starting the payments on June 27, 1931, the payments to be sent by pre-paid registered post to the wife at her address, which is given in the agreement as 2, St. Stephen's Square, Bayswater. The wife is to have the custody of the child without any interference on the part of the husband, but the husband is to have access, as may be agreed. That is the agreement, and, of course, the great difficulty in the way of the wife is that she has to prove desertion by the husband, although she has signed an agreement to live separate and apart from him. I do not propose for a moment to try to define desertion, but, as stated in *RAYDEN AND MORTIMER ON DIVORCE*, the essence of it is the forsaking or abandonment by one of the spouses of the other, and it is difficult to say that a wife is forsaken or abandoned by her husband if she has, in fact, agreed with him to live separate and apart from him. That is the great difficulty in the way of the wife.

What happened after the separation deed was that, although the husband was under a contractual obligation to pay 30s. per week to the wife for herself and her child, he paid only about £6 altogether during the first month or so after the agreement, and has never paid a penny since Oct., 1931. That is nearly seven years ago. In Oct., 1931, he disappeared. The wife was left practically destitute. She made attempts to find the husband, but without success. In Mar., 1933, she received an envelope addressed to her in the husband's handwriting, and containing a card of an hotel. She made inquiries there, but they

were fruitless. She worked for her living, and has maintained herself and the child since they parted.

The court is in a difficulty. One's sympathy naturally goes out to the petitioner fully. At the same time, the court has to do its duty, without being swayed by its own personal feelings and the desire to grant a decree, and the duty imposed upon me in this case is to satisfy myself, on the evidence, that the case for the petitioner is proved. As I have already stated, proof is required of the fact that the husband has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition. Several cases have been brought to my attention by Mr. Turner, who has put the case very fairly indeed on behalf of the wife, but, apart from *Ratcliffe v. Ratcliffe* (1), which LANGTON, J., decided this year, the other cases are all cases where the wife, under the old law, was claiming a decree on the grounds of her husband's adultery and desertion for two years. This is the first case in which a petition for divorce on the ground of desertion alone is made by a petitioner with a separation deed, so far as any reported case goes.

It seems to me quite clear that Mrs. Tate cannot succeed in her petition unless she is able to dispose of this deed, and to satisfy the court that it is no longer binding upon her, and has not been binding upon her for three years preceding the date of the petition. If, in fact, however, she was living under an agreement to live separate and apart from her husband during any part of those three years, it cannot be said that her husband at that time had deserted her. However, I think that I am entitled to look at all the facts of the case, and I start with the very important facts that the initial break-up of the home was due to a clear act of desertion by the husband and that these wrongful acts of the husband, constituting desertion, continue in their consequence until they are removed, or unless they are removed, by this deed.

In my view, the husband cannot rely upon the deed as protecting him from his original wrongful acts of desertion if it is clear on the evidence that he has treated the deed as not binding upon him in any way, and it seems to me quite clear on the facts that this is what he has done. If it is, perhaps, not quite a legal way of putting it, he has repudiated the deed by completely failing to make the all-important payments to his wife for herself and her child, and by disappearing and failing to keep in touch with the wife, and failing in any way to give her the help and support to which one spouse is entitled from the other. It is quite clear, to my mind, that the husband could not set up the deed which he has treated in this way as a defence to these proceedings, and I do not think that it would be fair or just to the wife if the court were to take the point which is not open to the husband, and thereby defeat her petition. I do not say for a moment that the court is unable to take the point if it wishes to take it. I do not think that, in the jurisdiction for divorce, that which is an estoppel binding on the husband estops

the court from reviewing all the facts, and seeing where the essential truth lies, but I am satisfied that in this case the facts are such as to prove that the husband has deserted his wife for three years immediately preceding the presentation of the petition, and that the wife is, therefore, entitled to her decree.

A *Decree nisi granted with custody.*

Solicitors : *Kenneth Brown, Baker, Baker* (for the petitioner).

[*Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.*]

B

THE ARANTZAZU MENDI.

[COURT OF APPEAL (Slessor, Finlay and Goddard, L.JJ.), **October 31, November 1, 1938.**]

C *Shipping—Foreign-owned vessel—Requisition by both de jure and de facto governments—Claim for possession—Impleading a foreign government.*

D

The ship *Arantzazu Mendi*, described as of the port of Bilbao, arrived at London on Aug. 11, 1937. On June 19, 1937, Bilbao had been captured by General Franco's forces, and on June 28, 1937, the ship was requisitioned by a decree of the Spanish Republican Government of that date. On Aug. 24, 1937, the owners issued a writ *in rem* for the possession of the ship, and she was arrested. On Mar. 2, 1938, the ship was requisitioned by the Nationalist Government of Spain. Notices of requisition were served on the owners on behalf of the Republican Government on Mar. 23, 1938, and on behalf of the Nationalist Government on Apr. 5, 1938. On Apr. 13, 1938, the owners declared that they freely submitted to the requisitioning of the Nationalist Government, and on the same date the Republican Government issued a writ claiming to have possession of the ship adjudged to them. The previous writ of Aug. 24, 1937, had been discontinued on Apr. 12, 1938. The Nationalist Government moved to set aside this second writ on the ground that it impleaded a foreign government. The Foreign Office stated that the *de jure* government of Spain was the Republican Government, but that the Nationalist Government was the *de facto* government of the larger portion of the country :—

E

F

HELD : (i) the Nationalist Government had been recognised by His Majesty as a *de facto* government, and must be regarded by the court as a sovereign state.

G

(ii) although the Nationalist Government had neither possession of, nor any ownership in, the ship in question, they had, by reason of the requisition, a lesser interest sufficient to compel them to come before the court to defend it. They were therefore impleaded, and the writ and warrant of arrest should be set aside.

Judgment of BUCKNILL, J. ([1938] 3 All E.R. 333) affirmed.

H

[EDITORIAL NOTE. The question of the effect of a recognition of a *de facto* government was considered in *Banco de Bilbao v. Rey* (2). This case carries the matter a step further, since the government concerned had neither possession of, nor ownership in, the ship in question, but had only such interest therein as was derived from a requisitioning of the ship freely submitted to by the owners. That lesser interest is here held to be sufficient to enable them to say that they are impleaded in the action.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 1, p. 95, para. 121 ; and FOR CASES, see DIGEST, Vol. 1, pp. 109-111, Nos. 127-146.]

Cases referred to :

- (1) *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 11 Digest 536, 387; 90 L.J.K.B. 1202; 125 L.T. 705.
- (2) *Banco de Bilbao v. Rey, Banco de Bilbao v. Sancha*, [1938] 2 K.B. 176; [1938] 2 All E.R. 253; Digest Supp.; 159 L.T. 369.
- (3) *The Petrel* (1836), 3 Hag. Adm. 299; 1 Digest 163, 731.
- (4) *Compania Naviera Vascongado v. The Cristina, The Cristina*, [1938] A.C. 485; [1938] 1 All E.R. 719; Digest Supp.; 107 L.J.P. 1; 159 L.T. 394.
- (5) *The Parlement Belge* (1880), 5 P.D. 197; 11 Digest 537, 394; 42 L.T. 273.
- (6) *The Porto Alexandre*, [1920] P. 30; Digest Supp.; 89 L.J.P. 97; 122 L.T. 661.
- (7) *The Broadmayne*, [1916] P. 64; 1 Digest 109, 131; 85 L.J.P. 153; 114 L.T. 891.
- (8) *Haile Sellassie v. Cable & Wireless, Ltd.*, [1938] Ch. 839; [1938] 3 All E.R. 384; Digest Supp.; 107 L.J.Ch. 201; 159 L.T. 385.
- (9) *The Jupiter* (1836), 3 Hag. Adm. 320; 41 Digest 739, 5870.
- (10) *Mighell v. Johore (Sultan)*, [1894] 1 Q.B. 149; 38 Digest 6, 10; 63 L.J.Q.B. 593; 70 L.T. 64.
- (11) *The Manilla* (1808), 1 Edw. 1; 38 Digest 6, 6.
- (12) *The Messicano* (1916), 32 T.L.R. 519; 41 Digest 814, 6754.
- (13) *The Crimdon* (1918), 35 T.L.R. 81; 41 Digest 815, 6762.

APPEAL from a decision of BUCKNILL, J., dated June 17, 1938, and reported [1938] 3 All E.R. 333.

G. St.C. Pilcher, K.C., and *Owen L. Bateson* for the appellants, the Republican Government of Spain.

Sir Robert Aske, K.C., *J. V. Naisby* and *R. Valls* for the respondents, the Nationalist Government of Spain.

Pilcher, K.C.: For a state to be able to claim immunity in these courts, it must show (i) that it is a state, and (ii) that it is a sovereign state. The area in question here is not a state. If it is a state or a sovereign state, the question arises: Has it been recognised as such by His Majesty's Government? The Foreign Office say that that is a question of law. I submit that it is a question of fact. One test is whether or not it has been accorded belligerent rights, and it has not. Another is whether or not its commercial representatives have been given diplomatic rights, and they have not. The court cannot recognise as a sovereign a state that has not even been accorded belligerent rights. [Counsel referred to *Mighell v. Johore (Sultan)* (10), *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.* (1), WHEATON ON INTERNATIONAL LAW, OPPENHEIM ON INTERNATIONAL LAW, *The Manilla* (11) and *The Cristina* (4).] This ship has been in the possession of the court ever since it was arrested. There is no case in which a foreign government has been held to be impleaded merely by the seizure of its ships unless it was in possession. In *The Cristina* (4), the decisions were based on actual possession by a foreign government. In *The Broadmayne* (7), it was admitted that the vessel was being operated by the Crown, which had full control of it. In *The Messicano* (12), the vessel was in the control of the Italian Government. [Counsel referred to *Haile Sellassie v. Cable & Wireless, Ltd.* (8), *The Porto Alexandre* (6)]

and *The Crimdon* (13).] It is necessary for parties to show a greater interest in a vessel than the fact that they have requisitioned her, in order to contend that they are impleaded. The captain of this ship has not got possession of it. The marshal has. Therefore the captain cannot hold it on behalf of a foreign government.

A *Aske, K.C.* : It is not necessary that the foreign government should be directly impleaded. It is sufficient if it is indirectly impleaded : *Haile Sellassie v. Cable & Wireless, Ltd.* (8) and *The Cristina* (4). Any person interested in a ship is impleaded in an action about that ship. To have control of it is sufficient. [Counsel referred to *The Crimdon* (13).]

B
SLESSER, L.J. : This is an appeal from a decision of BUCKNILL, J., arising out of a motion, which in itself is consequent upon a claim made by the plaintiffs, the Government of the Republic of Spain, to have adjudged to them possession of a certain steamship called the Arantzazu Mendi. As frequently is the case, and ought to be the case, according to the practice, in appropriate circumstances, the writ should be directed to persons interested in the ship. As BUCKNILL, J., said, the writ in this action is not in proper form according to R.S.C., Ord. 12, r. 24, which provides that any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the *res*. It is said here, however, that the defendants, the Nationalist Government of Spain, as they are called, have entered an appearance conditionally, and are parties interested in the *res*, and BUCKNILL, J., tells us that he has dealt with the case on the footing that the defendants, the Nationalist Government of Spain, have entered an appearance as interveners, and are parties interested in the *res*. The Nationalist Government of Spain, having so entered a conditional appearance, moved the court for an order that the writ and all subsequent proceedings in this action and the arrest of the Arantzazu Mendi be set aside on the following grounds :

F
(i) This action impleads a foreign sovereign state, namely, the Nationalist Government of Spain. The said government is unwilling to submit to the jurisdiction of this honourable court. (ii) The said steamship is in the possession of the said government by its duly authorised agents. (iii) The said government is, and at all material times was, entitled to possession of the said steamship. (iv) The dispute in this action is between two sovereign states and the court has no jurisdiction, or, alternatively, will not exercise its jurisdiction, to decide the same.
G (v) A claim to the said steamship is being made by a foreign sovereign state and the court has no jurisdiction, or, alternatively, will not exercise its jurisdiction, to decide the validity of the said claim.

H In the court below, BUCKNILL, J., acceded to the argument raised by the Nationalist Government of Spain, and, in the result, he made an order, as they prayed, and the arrest of the ship was continued until this appeal was determined. The question is whether he was right in so doing.

The first question which arises in this case is whether or not the Nationalist Government of Spain are a foreign sovereign state, because it is only if they establish that they are a government of a foreign

sovereign state that the claim which they make in their motion can be founded at all. In that matter, BUCKNILL, J., had occasion, according to the proper practice, to consult the appropriate government authority—namely, the Foreign Office—to ascertain the view of His Majesty with regard to this particular state, and for that purpose a question was addressed, by direction of BUCKNILL, J., to the Foreign Office—or, more strictly, to the Secretary of State for Foreign Affairs—to ascertain the will of His Majesty. In certain of the cases which have been cited to us, and in the argument, the expression has loosely been used that the government, or the Foreign Office, or the Secretary of State for Foreign Affairs, recognises, or does not recognise, what is alleged to be a foreign government. It is, of course, clear, however, that the recognition rests with His Majesty, and with His Majesty alone, and the government is merely an instrument, a proper instrument, of the will and the intention of His Majesty.

In this case, the question was raised whether the Nationalist Government of Spain is recognised by His Majesty's Government as a foreign sovereign state. The more correct constitutional question would have been whether the Nationalist Government of Spain is recognised by His Majesty as a foreign sovereign state. However, that does not impeach the validity of the answer which was received by the Foreign Office—which I regret fell into the same evil practice—and which is :

- (1) His Majesty's Government recognises Spain as a foreign sovereign state.
- (2) His Majesty's Government recognises the government of the Spanish Republic now having its seat in Barcelona as the *de jure* government of Spain.
- (3) No government other than that referred to in the preceding subparagraph is recognised by His Majesty's Government as the *de jure* government of Spain or any part thereof.
- (4) The Nationalist Government of Spain is a government in conflict with the government of the Spanish Republic established at Barcelona. It claims to be the government of Spain and is seeking to overthrow the government of the Spanish Republic and to establish its authority over the whole of Spain.
- (5) His Majesty's Government recognises the Nationalist Government as a government which at present exercises *de facto* administrative control over the larger portion of Spain.
- (6) His Majesty's Government recognises that the Nationalist Government now exercises effective administrative control over all the Basque provinces of Spain.
- (7) His Majesty's Government has not accorded any other recognition to the Nationalist Government.
- (8) The Nationalist Government is not a government subordinate to any other government in Spain.

From these answers, it is clear, first, that His Majesty recognises the Republican Government of Spain as the *de jure* government of the whole state. Yet it is equally clear that His Majesty's Government recognises, first, that the Nationalist administration—if I may use a neutral word—is a government. Secondly, His Majesty's Government recognises that it is a government not subordinate to any other government in Spain. Thirdly, it recognises that it now exercises effective administrative control over all the Basque provinces of Spain, an answer which is important in the present case, in that the ship which is here to be considered was registered in the port of Bilbao, which is within the Basque provinces of Spain.

In my opinion, having regard to those answers, it is clear on the authorities that the answers require this court to say that His Majesty

has recognised the Nationalist Government of Spain as the government of a foreign sovereign state. Whatever doubts might formerly have existed on this head were determined, so far as this court is concerned, by *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.* (1). There it was held that, even where a foreign government has only been recognised *de jure* or *de facto*, the court will not inquire into the validity of its acts. It is true, as Mr. Pilcher said, that the actual question under consideration was different from the one in the present case, but there are passages in the judgment which make it quite clear, to my mind, that this court, on the principles there laid down, would, both on the answers here given and on those there given, have regarded a government *de facto* as a foreign sovereign state. Thus, BANKES, L.J., says, at p. 543 :

Wheaton, quoting from Mountague Bernard, states the distinction between a *de jure* and a *de facto* government thus : " A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious."

In the same case, WARRINGTON, L.J., says, at p. 551 :

In fact I rather think a *de jure* government in international law means " one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them " ; while a *de facto* government is one which is " really in possession of them, although the possession may be wrongful or precarious."

Again, SCRUTTON, L.J., says, at p. 557 :

It may well be a question when first the struggling body attained such power that it was a government *de facto*, and over what area, and that you cannot answer that question by knowing that some years later the sovereign recognised it as the government *de facto* over a particular area. When that question is to be answered, the courts must ask the sovereign for information. . . .

I do not understand Mr. Pilcher in general to dispute that decision that a government held by His Majesty to be a government *de facto* should be regarded as a sovereign state, for the purposes of international law which here appear to be considered. His argument, as I understand it, is rather that, Spain being treated both in the question and in the answer as one unit, and in the present case there being a statement from the competent authority that *de jure* Spain is one unit, there is no complementary statement that the whole of Spain as such is *de facto* in the possession of the Nationalist Government ; and he is quite right in saying that no such point arises in *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.* (1), because there it was conceded that the whole of Russia—which was the country there to be considered—was *de facto* in the effective administration of the Soviet Republic. However, if authority be needed to deal with this matter, there has been in this court *Banco de Bilbao v. Rey, Banco de Bilbao v. Sancha* (2), where the court had to consider the *de facto* government of Nationalist Spain, which at that time, as now, though the boundaries may have been different in extent, was yet a *de facto* administration over only a portion of the

whole of Spain ; and there, as I read their Lordships' judgments, albeit they were considering a different matter, they did in terms apply the principles of the case of *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.* (1). That is to be found in the report of *Banco de Bilbao v. Rey, Banco de Bilbao v. Sancha* (2), where CLAUSON, L.J., stating the opinion of the whole court, said, at p. 195 ([1938] 2 All E.R. at p. 260) : A

So far at all events as this court is concerned this question [whether His Majesty's Government recognise the Spanish Republican Government with its seat in Valencia or Barcelona as the *de jure* government of the whole of Spain, but at the same time recognise the insurgent government of General Franco as the government *de facto* of the area in which Bilbao is situate] seems to be settled by the principles laid down in decisions of this court in *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.* (1). B

Even if there was no authority to that effect, I should myself unhesitatingly take the view that, once it is found as a fact, within certain boundaries, whatever they may be—and here we are told that they at least include the whole of the Basque provinces—that there was a *de facto* government, the mere fact that there was another government, claiming to be the *de jure* government, in that area, in the unit which is called Spain, if it be a unit, would not deprive the court of the duty of finding, on that statement, that that *de facto* government—which points to some orderly and organised institution—is so organised in that area, although fluctuating, as to possess the powers of a state. In those circumstances, I think that it is a proper conclusion that the Spanish Nationalist Government has been recognised by His Majesty *de facto*, and must be regarded by the court as a sovereign state. C D

It has been said by Mr. Pilcher, who has argued this case with great vigour and lucidity, that there may be some relation between the according of belligerent rights and the recognition of a sovereign state. I am unable to see the necessary connection between the two matters. It is quite true, as OPPENHEIM ON INTERNATIONAL LAW says—no doubt other authorities are to the same effect—that the mere fact that insurgents are recognised as a belligerent power will not necessarily of itself compel the court to recognise those insurgents as a sovereign foreign state. As he says in OPPENHEIM ON INTERNATIONAL LAW, 5th Edn., Vol. I, at p. 126 : E F

But between this recognition as a belligerent power and the recognition of these insurgents and their part of the country as a new state, there is a broad and deep gulf. G

In this case, however, whether there is such a gulf or not is beside the point. We have no information whether or not there are belligerent rights accorded to General Franco's government. I will assume for the purpose of this case, though I am doubtful about it, that we can take judicial notice of that fact. That is not a question we are here to consider. It may be that the mere fact of according belligerent rights does not constitute a government exercising sovereign rights a state. Here we are informed, without any reference to belligerent rights, that H

His Majesty does recognise the government—again I call attention to the word “government”—of Nationalist Spain as an independent body exercising effective administrative control within its own area.

In those circumstances, Mr. Pilcher is driven to his second argument, which, I will admit, has afforded me considerably more difficulty than has his first one. Assuming that the Nationalist Government are the government of a sovereign state, has it been shown here that this action is calculated so to implead them that they can object to the jurisdiction of the court? On that matter, it is necessary to enter to some extent into the history of this case. The ship, the Arantzazu Mendi, was the property of a private company registered at the port of Bilbao, and on June 28, 1937, not being then in Spanish waters, she was requisitioned by the Republican Government. The effect of that requisition was normally to require that the owner should, so far as the control and destination and disposition of the affairs of the ship were concerned—I am speaking generally—hold the ship under the disposition of that government. It was not a confiscation of the ship, but it was, as I say, a decree of requisition. That was the position there.

On Aug. 24, 1937, the ship having arrived within English territorial waters, the owners issued a writ for possession, and the ship was accordingly arrested in London. That action, in which a conditional appearance was entered by the Nationalist Government of Spain, and by the republic of Spain and by the shipping company, was adjourned, and the proceedings were stayed while another action was being heard in the Chancery Division, in which various claims of persons exercising or claiming proprietary rights in the company were being considered. That Chancery action was settled in Mar., 1938. I do not think that the terms of the settlement concern us here. On Apr. 12, accordingly, the action *in rem* for possession was discontinued. Before the ship was released from arrest, the Republican Government issued their writ in the present action. It appears that one reason why the ship was not released from arrest was that certain moneys were owing to the marshal in connection with the custody of the ship. On Mar. 2, 1938, the Nationalist Government had issued decrees, one in general terms requisitioning various ships, and a specific decree affecting this particular ship. The second article of that decree says:

The government, by means of the appropriate decrees and in fulfilment of the function which is defined in the first article [including all vessels of any class and nature engaged in maritime navigation and fishing and entered on the register of vessels of Spanish ports, and the like] will assume and put into practice such possessory and managerial powers as may be expedient for the proper employment and service of the vessels requisitioned and for the attainment of the purposes for which they were intended; all this without prejudice to rights of ownership and to fair and legal compensation to the lawful owners or managers, who will recover the whole of their powers and the full exercise of the rights which pertain to them so soon as the extraordinary circumstances which give rise to the limitation thereof shall disappear.

I think that on that Mr. Pilcher was right when he said that the requisition of the Nationalist Government on Mar. 2 did not purport to be a complete

extinction of the ownership of the owners of the ship, but only gave such necessary and managerial powers in the proper employment of the ship being requisitioned as were stated in the second article.

In those circumstances, on Mar. 23 the decree of the Republican Government, which had been dated, as I have said, June 28, 1937, was formally applied to the steamship in this case, and on Apr. 5, the ship then being in the custody of the marshal, the Nationalist Government served upon the master of the ship notice of their requisition. It appears, therefore, that both governments have sought to utilise their powers to obtain control of the ship. I would add that by an affidavit dated May 6, 1938, the captain of the ship says :

On Apr. 5, 1938, I was serving on the steamship Arantzazu Mendi as her master in the service of the Compania Naviera Sota y Aznar, the owners of the said steamship. On the said date I was served by the sub-agent of the Nationalist Government of Spain with a notice of requisition by the said government of the said steamship Arantzazu Mendi and I undertook to hold the possession of the said vessel for and on behalf of the said Nationalist Government of Spain. Since the said date I have continued on board the said vessel and have held and still hold the same solely on behalf of and at the order and disposition of the said Nationalist Government, and have not recognised and do not recognise any other authority than the said government. At no time since Apr. 5, 1938, have I received any instructions or communications from the plaintiffs in this action or their representative, neither do I recognise nor acknowledge their right to give me any instructions.

To that must be added another statement, which is in the form of an affidavit by an agent of the Nationalist Government, the Marques Luis Martinez de Yrujo. It is a translation. It is an exhibit from the Spanish of a protocol book of public instruments kept at the sub-agency, and contains this matter. After reciting that he is the sub-agent in charge of the Consulate General, he says that the managing director of the company which owned the ship, the Naviera Sota y Aznar, makes the following declaration :

That on Apr. 5, 1938, he received a notification from His Excellency the Duke of Alba, agent of the Spanish state in Great Britain, to the effect that, in pursuance of the decree-law dated Mar. 2, 1938, and the decree of the same date, both published in the official bulletin . . .

Then follows the decree to which I have already referred. I have already referred to certain ships which had been requisitioned, including the ships referred to in this case.

He declares that he freely submits to what is provided in the said decrees and, in the name of the Compania Naviera Sota y Aznar, gives his consent to the said vessels being requisitioned at the free disposal of the National Government of Spain to the intent that it may make use of such vessels in the manner laid down in the said decrees.

As I have already pointed out, in that decree the Nationalist Government of Spain had stated that, subject to the rights of control and disposition which I have mentioned, ownership should remain in the owners, and that they might seek compensation.

On that, it is said by Mr. Pilcher that really in this case it is not right to take the view that the Nationalist Government are impleaded. He points out, first of all, that at all material times they are unable to say

that they are in possession of this ship. He points out that at all material times the marshal of the Admiralty Department of the High Court was actually in possession of this ship, and that therefore it is wrong to say that at any time they can claim any right as being in possession.

A Having considered the necessary rules and the authorities which have discussed the position of the marshal, it appears to me that it is right to say that the legal possession of the ship during this period was in the marshal. It is not necessary, for this purpose, to cite many authorities, but I will mention *The Petrel* (3), where SIR JOHN NICHOLL, speaking of the case of a ship which was arrested by the marshal, speaks of it, at p. B 301, as "this vessel, while in the legal possession of this court." I am prepared, at any rate, to assume for the purposes of this case that at all material times it is right to say that the National Government were never able to say that they were in possession of this ship.

C Having come to that conclusion, however, I do not think that that by any means disposes of the matters which we have here to consider. The Republican Government of Spain by their writ claim without qualification to be entitled to have possession of the ship adjudged to them, and, as has been pointed out in the action *in rem*, if they succeeded, that would necessarily have the effect of destroying any other D interests in this ship which might properly be claimed by any other adverse party.

E The evidence before the court is to the effect that both the master and the owner agree that so much interest in this ship as is included in the powers of requisition has by them been accorded to the Nationalist Government. Those are, I agree, not powers of ownership, but powers of the disposition and control of the ship. For this purpose, it seems to me not material to inquire whether or not that requisition was of legal effect in Spain. It is enough to say that the powers mentioned in that requisition—namely, the powers, short of ownership, of disposition and F control—are conceded by the owner and the master now to be held by them as agents for the Nationalist Government. The question then arises on that whether, in order to resist the claim of the Republican Government—which, if it succeeded, would exclude even these powers—it is necessary for the Nationalist Government to intervene, to appear G as defendants and be impleaded—that is to say, to sacrifice their independence in order to maintain their proprietary interest in these rights.

H The matter is not free from authority, and, in particular, I would refer to the opinion of LORD WRIGHT in *Compania Naviera Vascongada v. The Cristina, The Cristina* (4), where he says, at p. 507 ([1938] 1 All E.R. at pp. 731, 732):

The appellants, while not contesting the general principle, have denied that it applies to the facts of the present case, for various reasons. In the first place they have relied on the fact that the Spanish Government had no property (in the sense of ownership) in the *Cristina* [there, as here, the Spanish Government (that is, the Republican Government) had claimed by requisition to control and deal with

the ship], whereas in *The Parlement Belge* (5) the Belgian Government was the owner of the mail packet. But the rule is not limited to ownership. It applies to cases where what the government has is a lesser interest, which may be not merely not proprietary but not even possessory. Thus it has been applied to vessels requisitioned by a government, where in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign state, is subject to its direction and employed under its orders. That was a separate ground in *The Porto Alexandre* (6), apart from the question whether, or fact that, the vessel had actually become the property of the Portuguese Government, which was possessing and employing her. A

Later LORD WRIGHT also quotes to the like effect *The Broadmayne* (7). I can find in the opinions of the House of Lords in *The Cristina* (4) no statement which throws any doubt on that proposition.

It is true that both in that case and in the case heard in this court, *Haile Sellassie v. Cable & Wireless, Ltd.* (8), there are observations that a mere claim of itself will not necessarily justify the intervention, either on the record or before the court, of a sovereign any more than that of any other person. However, here we have, on the face of it, the claim made by the master and by the owner that they do hold these limited interests arising from the requisition for the Nationalist Government in Spain. I therefore am of opinion, first, that the Nationalist Government have not shown that they are in possession of this ship, and, secondly, that they have failed to show that they have any ownership in this ship. Nevertheless, I think, following LORD WRIGHT, that they have shown that they have a lesser interest imposed by the requisition, which interest, on the uncontradicted evidence, is held for their benefit by the master and the owner, who have both said that they would act according to the desires of the Nationalist Government as expressed in the requisition, and that they have shown a sufficient interest for the Nationalist Government to be compelled, unless they wish to see that interest destroyed, to come before the court and defend that interest. They are therefore put to the election of sacrificing, as it has been said, either their independence or their property, for this interest is a proprietary interest, albeit it does not go to the fullest extent of ownership. For these reasons, I think that they may say that they are impleaded in this action and that their rights in these interests are at stake, and, being the government of a sovereign state, they will rely upon the general principle which has been laid down for so many years in *The Parlement Belge* (5) and *The Jupiter* (9) of classical expression, and I think that BUCKNILL, J., was right in his decision, in which he acceded to the motion and made an order accordingly. The question as to whether, and in what circumstances, the arrest may or may not be continued must remain over for consideration until my brethren have given their judgments. In my opinion, this appeal fails, and must be dismissed with costs. B C D E F G H

FINLAY, L.J.: I am of the same opinion, and I desire only to add a very few words, because, for myself, I am perfectly content with the manner in which the case has been put by SLESSER, L.J., and, I may add, with the way it was put by BUCKNILL, J., in the court below.

On the first point I do not want to add anything at all. On the second point—namely, whether the Nationalist Government are here impleaded—I desire to add this. The law is, I think, clearly stated in two passages in *The Cristina* (4). One is the passage in the opinion of LORD WRIGHT which has just been read by SLESSER, L.J., and which I do not need to read again. The other is a passage in the opinion of LORD ATKIN, which I think is important, where he says, at p. 492 ([1938] 1 All E.R. at p. 722) :

In these days it is unusual to name defendants : when the defendants are described as “ the owners of a vessel ” they can be at once identified. When persons are not entitled the defendants but in the body of the writ are cited to appear as persons claiming an interest, there is said to be some uncertainty whether they appear under leave to intervene or without such leave. In any case when they do appear they appear as defendants, and as such I conceive that they are impleaded. And, when they cannot be heard to protect their interest unless they appear as defendants, I incline to hold that, if they are persons claiming an interest, they are by the very terms of the writ impleaded.

Here, for the reasons which have just been given by SLESSER, L.J., it appears to me quite clear that there was an interest in the Spanish Nationalist Government. The owner and the officer had agreed to hold the ship on the terms that it should be subject to requisition by the Nationalist Government. What the rights of a government to requisition a ship are have been defined in a good many cases—for example, *The Broadmayne* (7)—and I find it impossible to see how it can be said here that the Spanish National Government have not, and cannot have, an interest in the matter now being decided. A claim has been put forward, and they will therefore inevitably lose the rights which they claim if judgment is given in accordance with the prayer of the writ.

As I understood it, the ground on which Mr. Pilcher rested this part of his case appeared to me throughout to be a technicality, though, of course, a technicality which had to be dealt with. He said : “ But the marshal here is in possession.” Assuming that the sole possession is in the marshal—which is a matter which might require some further discussion, but assuming that—I do not think that it carries Mr. Pilcher’s point, because the rights to be considered are not rights of possession. They are proprietary rights, as was pointed out by LORD WRIGHT in the passage just read by SLESSER, L.J. Assuming that the true view is that possession is so exhaustively in the marshal that there can be no possession other than that, I find it to be quite impossible to see why, by taking that view, it should be said that a right—a very important right—is not here being claimed by the Nationalist Government, nor why, if the ship was adjudged as claimed in the writ, the Nationalist Government would not be deprived of that right. For these reasons, which are purely supplementary to those given by BUCKNILL, J., below, and by SLESSER, L.J., I agree.

GODDARD, L.J. : I am of the same opinion. I think that the strength of Mr. Pilcher’s argument on the first point was as to the true

construction, if I may so put it, of the letter which the Secretary of State wrote in answer to the questions propounded by BUCKNILL, J. I have always understood, and I believe it to be the law, that, where a question is raised as to the status of a body of persons claiming to be a government of a sovereign state, where a question is raised as to whether there is sovereignty in that body or not, it is not for the court to decide it. A The court cannot take evidence on that point, and it is not for the court to express a finding on that point. The proper course, and the only course, is to inquire of the Secretary of State what His Majesty's attitude is pleased to be, and it seems to me that it is most desirable in these cases that, where a court propounds a question of this sort to the Secretary of B State, a clear answer should be given, if it is possible to give one. If, of course, His Majesty is not pleased to come to any determination on the facts, then the court should be so informed.

In this case, the question propounded by BUCKNILL, J., was whether the Nationalist Government of Spain is recognised by His Majesty's C Government as a foreign sovereign state, and the answer was given in nine paragraphs. The facts which are set out by the Secretary of State seem to me to amount beyond any question of doubt to this, that the Nationalist Government of Spain is a *de facto* sovereign state. I say that particularly for the reason that para. 5 of the answer is as follows : D

His Majesty's Government recognises the Nationalist Government as a government which at present exercises *de facto* administrative control over the larger portion of Spain.

Para. 6 of the answer is as follows :

His Majesty's Government recognises that the Nationalist Government now E exercises effective administrative control over all the Basque provinces of Spain.

I do not know whether that is in any way meant to be different from *de facto* administrative control, but I should think that it is the same thing.

Para. 7 is as follows :

His Majesty's Government has not accorded any other recognition to the F Nationalist Government.

More particularly, para. 8 is as follows :

The Nationalist Government is not a government subordinate to any other government in Spain.

I take it, *ex hypothesi*, that it was not subordinate to any other government. G In *The Parlement Belge* (5), the test of sovereignty for the purpose of immunity was laid down by BRETT, L.J. Therefore, if the Secretary of State informs the court that the Nationalist Government had absolute independence of any superior authority, he informs the court that the government are *de facto* the sovereign state over that part of Spain. H Nor do I think I can accede to Mr. Pilcher's contention that, because the Secretary of State informs the court that His Majesty's Government recognises Spain as a foreign sovereign state, that necessarily excludes the Nationalist Government as a sovereign state because it does not exercise jurisdiction over the whole of Spain. It is just because there are these competing governments that the question of *de facto* and

A *de jure* governments arises, and, if there can be a *de facto* and a *de jure* government over the whole of the country, I cannot see why there cannot be such governments over part of the country. It seems to me, therefore, that we are informed by the Secretary of State with sufficient clearness, though I could wish with a little more directness, that there is a *de facto* government in the Nationalist Government of Spain, and, accordingly, we are bound by authority to hold that for all purposes the consequences are the same as they would be if the government were a *de jure* government.

B On the second point I also agree with SLESSER and FINLAY, L.JJ. The opinions in *The Cristina* (4) and the judgment in the recent case in this court, *Haile Sellassie v. Cable & Wireless, Ltd.* (8), I think, show that, where a claim for immunity is made by a foreign sovereign, it is not enough that his claim should be a bare assertion of right, as LORD WRIGHT called it, or a mere claim, as LORD MAUGHAM called it. If the court C can see that the question that arises is a question of competing rights, as in this case here, if it is the fact that the owner of the ship admittedly has purported to give to the foreign sovereign who is claiming immunity, rights over the ship—it may be that those rights are good or it may be they are bad, that is just what we cannot try—but, if he D purports to give rights over his ship, then there is more than a mere claim, and evidence before the court on which it can be shown that the question which is to be decided in the case is one of competing rights, and it appears to me that the principle of immunity applies. In such circumstances this court has no option but to say that the decision of E BUCKNILL, J., is right, and the appeal is dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords. Ship to remain under arrest, provided that notice of appeal be given within a week.

F Solicitors: *Petch & Co.* (for the appellants); *H. A. Crowe & Co.* (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

G *Re* MARSLAND, LLOYDS BANK, LTD. *v.* MARSLAND.

[CHANCERY DIVISION (Farwell, J.), **November 3, 4, 1938.**]

Wills—Covenant not to revoke—Revocation by remarriage—Restraint of marriage—Public policy—Validity.

H A husband and wife entered into a separation deed on May 30, 1902, wherein the husband covenanted that he would not revoke nor alter a will which he had already made. That will gave one half of his estate to trustees upon trust for the wife and the issue of the marriage. The husband subsequently remarried and made a new will not giving the one-half of his estate to trustees upon the then subsisting trusts of the first will. The question upon this summons was whether or not the covenant not to revoke the former will was void:—

HELD: the covenant was not enforceable. A covenant not to revoke

a will which is broken either by marriage or by remarriage is, to that extent, not enforceable, as being in restraint of marriage and against public policy.

[EDITORIAL NOTE. A covenant not to revoke a will is not enforceable in damages when the breach is occasioned by the marriage or remarriage of the covenantor, but otherwise there is no difference between such a covenant and any other covenant or agreement relating to wills as regards its binding effect. The covenant has been said to be divisible in the sense that it is enforceable as regards revocation by any means other than that of marriage.

AS TO COVENANTS RELATING TO WILLS, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 514, 515, para. 1025; and FOR CASES, see DIGEST, Vol. 44, pp. 178, 179, Nos. 73-86.]

Cases referred to :

- (1) *Robinson v. Ommanney* (1882), 21 Ch.D. 780; *affd.* (1883), 23 Ch.D. 285; 44 Digest 179, 83; 52 L.J.Ch. 440; 49 L.T. 19.
- (2) *Briggs v. Parsloe*, [1937] 3 All E.R. 831; Digest Supp.

ADJOURNED SUMMONS for the determination of the question whether a covenant contained in a separation deed dated May 30, 1902, by which the husband covenanted not to revoke a will previously executed by him, was rendered unenforceable by his subsequent remarriage.

H. O. Danckwerts for the plaintiffs, the executors and trustees of the will.

L. M. Jopling for the first defendant, Clara Louise Marsland, widow of the testator.

J. Leonard Stone for Mrs. Grace Mavis Gutteridge, a daughter of the testator.

W. J. C. Tonge for Mary Emma Marsland, a sister of the testator.

P. A. Ferns for Ann Austin Gutteridge, an infant beneficiary.

Herbert Hart for Bertram Marsland, one of the testator's sons.

Jopling : In *Robinson v. Ommanney* (1), it was contended that the covenant was void, and that such a covenant would be in restraint of marriage. This is a condition, and what the testator was trying to prevent was the making of a claim under the deed of separation by the children.

Stone : The wife is to have a life interest and cl. 4 of the agreement provided that the husband should not revoke his will nor alter the effect of the gift of the half of his estate to his wife and children. It also provided that the wife should have the custody of the children, and that the husband should have access. The effect of cl. 4 is quite clearly a covenant by the husband to make a provision by his will. There was an existing will. It was part and parcel of the same agreement. In *Robinson v. Ommanney* (1), it was held by KAY, J., that such a covenant was perfectly good. [Counsel also referred to *Briggs v. Parsloe* (2).]

Ferns : Appearing in a representative capacity, I must argue against the validity of the will. The effect of *Robinson v. Ommanney* (1) is explicit. There is a covenant here capable of enforcement, and, if it is a

case for enforcement, it sounds in damages. To give someone the same thing would be to enforce specific performance. By virtue of the agreement, the share must go to the infant.

A *Hart*: The will is revoked by the second marriage. None the less damages can be recovered for the alteration of the will. Since the subsequent marriage revoked the first will there could be no alteration of that, and the true effect of the second will is an alteration of the first will for which damages can be recovered.

B FARWELL, J.: This summons raises a curious question upon the will of one Fred Marsland. He made his will on Feb. 17, 1935, and he died on May 28, 1936. The testator was twice married. By his first marriage he had two children, but unhappy differences occurred between the spouses, and in 1902 a suit for judicial separation, in which the then wife was petitioner and the husband the respondent, was on foot.
C By an indenture made on May 30, 1902, between the husband and his wife, that matter was compromised, and compromised by the following provisions, which are contained in the separation deed. The deed began by reciting the separation suit and the unhappy differences. It recited that there were two children of the marriage, "... a son
D Bertram now of the age of 12 years and a daughter Grace Mavis now of the age of 7 years." Then it recited as follows:

Immediately before the execution of these presents the said Fred Marsland has duly executed his last will and testament whereby he has devised and bequeathed one half of his estate to the trustees therein mentioned upon trust to invest the same and to stand possessed thereof and of the investments for the time being representing the same in trust as to two equal third parts or shares thereof to pay the annual income thereof to the said Annie Marsland during her life with remainder to the children of the said marriage as to two third parts of such two-thirds to his son Bertram and one third part of such two-thirds for his daughter Grace Mavis and as to the remaining one third part or share thereof to expend the annual income thereof upon the maintenance of the children of the said marriage until the elder one shall attain the age of 24 years and upon the happening of that event in trust for the said children as to two-thirds of such one third for his said son Bertram
F and one third of such one third for his said daughter Grace Mavis.

Then the indenture witnessed that the parties agreed, in consideration of the covenants thereafter contained that the husband covenanted with his wife that she should live separate and apart from her husband with the usual provisions in a separation deed, and there was a provision
G for the payment to the wife "of the annual sums" which are therein mentioned. Then the deed contained these words, which are in effect, I think, a covenant by the husband:

And also that the said Fred Marsland shall and will not revoke the before-mentioned will or alter the same so far as regards the gift of the half of his estate to his wife and children as aforesaid.
H

Then there is a provision as to certain household furniture, which I need not read. Then there is a provision that Annie Marsland shall

... so long as she shall remain chaste have the custody of the said two children and shall clothe maintain and educate them and that the said Fred Marsland shall have access to them under such arrangements as shall from time to time be made between them for that purpose.

That deed of separation having been entered into, some four years later the first wife died, and subsequently the husband remarried. The effect of that remarriage of the husband was to revoke that will. The will the testator made, which was the effective will at his death, was made, as I have already said, in Feb., 1935. Meanwhile, just to complete the history of the matter, in 1922 the testator had entered into an arrangement with the sister under which certain leaseholds were assigned by her to him in consideration of a covenant to pay her daughter an annuity of £170.

In these circumstances, the question arises as to what is the effect of this last will of the testator, having regard to the previous transaction which has taken place. So far as the assignment of the leaseholds goes, that creates a debt which must be provided for out of the estate, before there can be anything for the beneficiaries. The real difficulty which arises in this case, however, is the result of the provision in the separation deed as to the non-revocation or alteration of the first will, and the subsequent provision in the testator's last will as to one or other of the children not being content with the provision made for him or her in the second will.

It is stated in the headnote to *Robinson v. Ommannney* (1), a decision of KAY, J. :

A covenant not to revoke a will is not necessarily against public policy, as being in restraint of marriage.

In that case, the position, as stated by the headnote, was this :

A mortgagor not a trader appointed certain property by will as a security to the mortgagee, and covenanted not to revoke the will. She became bankrupt under the Bankruptcy Act, 1849, and obtained her discharge. *Held*, That the contingent liability under the covenant not to revoke was incapable of proof under the bankruptcy, and that an action would lie for damages for breach of the covenant committed after her discharge.

The result of the covenant not to revoke a will is discussed by KAY, J., who points out that the covenant itself is not necessarily bad as being against public policy. However, he does point out that such a covenant may be read separately, as it were, and that, if the covenant of the testator is affected by the remarriage of the covenantor, then the covenant is not enforceable, because the covenant is in effect a covenant against marriage, which itself is against public policy. I think that it is now settled that a covenant not to revoke a will, which is broken in each one of the ways by which such a covenant may be broken, remarriage or marriage, to that extent, and to that extent only, is not enforceable. In the present case, it is pointed out that the covenant is not only : "I merely covenant not to revoke the will." It is an alternative covenant not to alter the same so far as regards the gift of half of his estate to his wife. It is said that, although the provision as to revocation may not be enforceable, there is nothing against public policy which prevents a man from altering his will, and that the mere alteration of the will, apart from any question of revocation by marriage, is wholly unobjection-

able, and that what happened in this case, in effect, was that a provision which the testator made for his wife and children under the deed had been altered as a result of the subsequent will, and that, therefore, the daughter who desires to enforce the covenant in the separation deed is now entitled to recover damages for breach of the covenant to the

A amount of the value of the interest given in the testator's estate by the deed itself. That is a plausible argument, but I think that it is fundamentally unsound, because, although, no doubt, the will has altered the provisions of the deed with regard to the gift of half of his estate, the real mischief that has been done, so far as the daughter is concerned,

B has been done by the revocation of the first will, which was itself the result of the remarriage of the testator. It is, therefore, in effect a covenant not to revoke the will by subsequent marriage, and it is that covenant which has been broken. That covenant, in my judgment, is one which is unenforceable, as being against the policy of the law,

C which does not permit a covenant of that sort in restraint of marriage. That is, of course, marriage generally. Therefore, in my judgment, the covenant in this deed is not enforceable. In those circumstances, it would seem that the daughter cannot enforce her rights.

D Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Ramsden, Sykes & Ramsden*, Huddersfield (for the plaintiffs, for the widow, for a sister and a son of the testator); *Marchant, Newington & Dommatt*, agent for *J. A. K. Ferns*, Stockport (for the testator's daughter and for an infant beneficiary).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

E

HOARE v. ADAM SMITH (LONDON), LTD.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge), **November 1, 2, 1938.**]

F

Money—Moneylending—Memorandum of loan agreement—Loan secured by bill of sale—Borrower receiving copy of bill of sale—Reference to power of seizure and sale—Moneylenders Act, 1927 (c. 21), s. 6.

G

A loan by registered moneylenders was secured by a bill of sale. It appeared both from the memorandum and from the evidence that the borrower had received a copy of the bill of sale. It was contended that the memorandum was insufficient, since it did not state the power of seizure and sale contained in the bill of sale. It was further contended that, although in the bill of sale the consideration was not truly stated, the plaintiff was estopped from raising that point, because he knew the true facts at the time of execution:—

H

HELD: (i) it is not necessary that the power of seizure and sale under the bill of sale should be specifically set out in the memorandum of loan where the borrower receives a copy of the bill of sale.

(ii) the plaintiff was not estopped from alleging that the consideration was not truly stated in the bill of sale.

(iii) similarly, a borrower would not be estopped from asserting the inaccuracy of statements in the memorandum of loan under the Moneylenders Act, 1927, s. 6, although he knew the true facts.

Mitchener v. Equitable Investment Co., Ltd. (1) explained.

H

[EDITORIAL NOTE.] This case points out that the decision in *Mitchener v. Equitable Investment Co., Ltd.* (1) only applies in cases where the borrower is not given a copy of the bill of sale. It had been thought that in all cases where a loan was secured by a bill of sale, it was necessary to state in the memorandum the power of seizure and sale contained in the bill of sale. In cases where the borrower has received such a copy, or, perhaps, where he has seen the original, it is sufficient to incorporate the bill of sale in the memorandum of loan by reference. A

AS TO SUFFICIENCY OF MEMORANDUM, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 190, 191, para. 280; and FOR CASES, see DIGEST, Supp., Money and Money-lending, Nos. 353a-353y.]

Cases referred to :

- (1) *Mitchener v. Equitable Investment Co., Ltd.*, [1938] 2 K.B. 559; [1938] 1 All E.R. 303; Digest Supp.; 107 L.J.K.B. 316; 158 L.T. 176. B
- (2) *Stewart-Naylor v. London & Westminster Loan & Discount Co., Ltd.* (1937), Unreported.
- (3) *Reading Trust, Ltd. v. Spero, Spero v. Reading Trust, Ltd.*, [1930] 1 K.B. 492; Digest Supp.; 99 L.J.K.B. 186; 142 L.T. 361. C

ACTION against registered moneylenders claiming that certain transactions were unenforceable by reason of the non-compliance with the Moneylenders Act, 1927, s. 6, in respect of the memorandum of loan, and for other relief. For the purposes of this report, it is sufficient to state that, by a contract in writing dated July 28, 1937, the plaintiff agreed to borrow £40 from the defendants, of which sum £25 8s. 9d. was alleged to be owing in respect of a former loan and £14 11s. 3d. was alleged to be then advanced. In fact, only £13 0s. 3d. was advanced, £1 11s. being deducted by the defendants in respect of stamp, charges and travelling expenses. It was also proved by the evidence of an accountant that the sum owing was not in fact £25 8s. 9d., but a smaller sum. This transaction was in fact the last of six such transactions between the parties. The memorandum of loan was in the following terms : D

I [plaintiff's name and address] agree to borrow from [defendants] the sum of £40 hereby executing a bill of sale for that amount and agree also to pay interest upon the said sum of £40 at the rate of 48 per centum per annum by monthly instalments of £3 until the whole sum of £40 and interest that accrues is paid. I am quite agreeable to pay this rate of interest for the sum of £40 and fully understand the nature of this undertaking. Copies of this document and bill of sale have been handed to me and I declare I signed this memorandum before I signed the bill of sale for the sum of £40 advanced July 28, 1937. E

This memorandum was signed by the plaintiff. It was pleaded that this memorandum was insufficient because (*inter alia*) it did not set out the power of seizure and sale included in the bill of sale. F

H. Samuels for the plaintiff.

J. B. Blagden for the defendants. G

DU PARCQ, L.J. : This is an action by Mr. Walter Thomas Hoare against a limited company, Adam Smith (London), Ltd., registered moneylenders. Mr. Hoare has had transactions over a number of years with these moneylenders, and they took security from him in the form of H

a bill of sale. As to the security given, part of the subject-matter, at any rate, the bill of sale, they say that they did not want, but included it in the bill of sale only to oblige the plaintiff, thereby protecting him from his family. I think that I must deal with this not so much as a philanthropical loan, but rather as a matter of business, according
A to the ordinary rules of law.

The first question which I have to consider is whether the plaintiff is entitled to a declaration that the contract of July 28, 1937, and the bill of sale of the same date, are illegal, void, and unenforceable, by reason of non-compliance with the provisions of the Bills of Sale Act
B and the Moneylenders Acts, 1900 to 1927, and to delivery up of the bill of sale, and to an injunction to restrain the defendants from taking any steps to enforce the bill of sale. A great many points have been taken. I think that this is a case where the moneylenders are entitled to say that the bill of sale must be looked at together with the memorandum
C to see whether the memorandum contains what the Moneylenders Act, 1927, says that it ought to contain. I do not in the least dissent from the judgment of LAWRENCE, J., in the case of *Mitchener v. Equitable Investment Co., Ltd.* (1). It is plain in that case, as, indeed, it is in the case which was before LEWIS, J., of *Stewart-Naylor v. London & West-*
D *minster Loan & Discount Co., Ltd.* (2), that the borrower had not received a copy of the bill of sale, and I think that, applying what I regard as having been decided at any rate by the majority of the Court of Appeal in *Reading Trust, Ltd. v. Spero* (3), it is, in all the circumstances, sufficient if the bill of sale contains accurately all the terms of the contract. That,
E however, does not conclude the matter.

I have before me the evidence, which is really not contradicted, of Mr. Norman, an accountant, who has gone through all these figures, that the bill of sale is wrong in the last transaction. The memorandum says that there is an agreement to borrow £40, the borrower executing
F a bill of sale to that amount. When one looks at the bill of sale, one finds that it is recited that £25 8s. 9d. is still due and owing, and that the borrower is to pay that out of the £40 now advanced to him. Then come the words :

In consideration of the sum of £14 11s. 3d. now advanced to the borrower and
G the sum of £25 8s. 9d. due and owing by the borrower.

That is wrong on the evidence before me. There was not £25 8s. 9d. owing, but something less. One may say that he was not lent £40 at all, or that he was made to pay more than he ought to the lenders. The consideration is not truly stated. I think that, under the Bills of
H Sale Act, 1882, s. 8, the plaintiff acquires a right to have the bill of sale treated as void in respect of the chattels comprised therein. I think also that the memorandum must be said to be bad because the moneylenders have not complied with the statutory requirements of stating the actual amount of the loan.

This case has been very clearly argued for the defendants by Mr.

Blagden, and his answer to this point is that the plaintiff is estopped from raising it. I think that Mr. Samuels is right when he says that it is impossible for the defendants to rely on any plea of estoppel. In a great many cases, the provisions of the Bills of Sale Act would become a nullity if one said that the statement in the consideration of the bill of sale operated to estop a party to it from denying that it was truly stated. One gets into a hopeless confusion, and the Act becomes of no effect. I think that similar considerations apply to the Money-lenders Act, 1927. Sect. 6 provides "that the note or memorandum shall contain all the terms of the contract," and, when part of the terms are to be found in a bill of sale by reference—as I think they may be—it is no answer to a contention that the terms of the contract are inaccurately stated to set up a supposed estoppel arising out of the bill of sale. That would be to prevent the court from carrying out the intention of the legislature, and would make legal that which is illegal.

Solicitors: *Lieberman, Leigh & Co.* (for the plaintiff); *T. Vincent Howells* (for the defendants).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

Re BERTON, VANDYK v. BERTON.

[CHANCERY DIVISION (Clouston, L.J., sitting as an additional judge),
October 27, 1938.]

Trusts—Administration—Rule in Howe v. Dartmouth (Earl)—Leaseholds—Beneficial interests in undivided shares—Statutory trust for sale—Law of Property Act, 1925 (c. 20), ss. 25, 28(2), 34, 35.

A testator gave the income of the whole of his real and personal estate to two persons in equal shares. The will contained no express trust for sale, but, having regard to the provisions of the Law of Property Act, 1925, relating to property held in undivided shares, the land included in the gift would become subject to a statutory trust for sale, including a power to postpone the sale. The gift included certain long leaseholds, and it was contended that the rule in *Howe v. Dartmouth (Earl)* (1) did not apply to such a gift, since it had been previously decided that, in the case of such a gift, where there was an express trust for sale with power of postponement in the will, that rule did not apply:—

HELD: the rule in *Howe v. Dartmouth (Earl)* (1) does not apply to a gift of leaseholds subject to the statutory trust for sale with power of postponement arising under the Law of Property Act, 1925, ss. 34, 35.

[EDITORIAL NOTE. The present case extends the decision in *Re Brooker, Brooker v. Brooker* (2) to the case where leaseholds are held upon the statutory trusts applicable where property is held in undivided shares. In *Re Brooker, Brooker v. Brooker* (2), there was an express trust for sale in the will. In the present case there is no trust for sale in the will, but such a trust automatically arises under the provisions of the Law of Property Act, 1925.

AS TO THE RULE in *Howe v. Dartmouth (Earl)*, see HALSBURY, 1st Edn., Vol. 28, Trusts, pp. 30-32, para. 60; and FOR CASES, see DIGEST, Vol. 44, pp. 197-211, Nos. 265-382.]

Cases referred to :

- (1) *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)* (1802), 7 Ves. 137 ; 40 Digest 672, 2090.
(2) *Re Brooker*, *Brooker v. Brooker* (1926), 70 Sol. Jo. 526 ; 40 Digest 673, 2099.

A ADJOURNED SUMMONS for the determination of the question whether, upon a bequest of long leaseholds to two persons to share the income thereof, there being no express trust for sale in the will, the rule in *Howe v. Dartmouth (Earl)* (1) ought to be applied by reason of the property being necessarily held upon the statutory trusts by virtue of the Law of Property Act, 1925, ss. 25, 28, 34.

B *Andrew Clark* for the trustees.
T. A. C. Burgess for the life tenants.
R. O. Wilberforce for the remaindermen.

C CLAUSON, L.J. : The testator by his will, subject to a life interest given to his wife, bequeathed the whole of the income of his real and personal estate in equal parts to his son and daughter, and on their deaths the income to which he or she was entitled was to be equally divided between their respective children. It will be observed that there was no trust for conversion. A considerable part of what forms the subject-matter of the gift is long leaseholds. It is correctly suggested that, had it stood there as the subject-matter for decision before Jan. 1, 1926, the trustee in the administration of the estate ought, having regard to *Howe v. Dartmouth (Earl)* (1), to have converted the long leaseholds, unless it appeared from the will, and it is suggested that it does not so appear, that specific enjoyment by the life tenant was indicated. However, the will was made, and the testator died, after the new legislation came into force. Since that new legislation, there has been decided by a case binding on me, the correctness of which nobody has questioned before me, that, where there was in the will a trust to convert with a power to postpone, and a part of the residue to which the trust related consisted of leaseholds, in view of the fact that leaseholds came within the term "land" in the new legislation, and in view of the provisions of the Law of Property Act, 1925, s. 28 (2), as to the application of rents and profits until sale, that is to say,

G . . . in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made . . .

H the result was in that particular case that the rule in *Howe v. Dartmouth (Earl)* (1) was treated as no longer applicable. That was the decision of P. O. LAWRENCE, J., in *Re Brooker*, *Brooker v. Brooker* (2), and the will in that case contained in express terms a trust for sale and a power to postpone.

The gift in the present case is for two persons to share the income, and it has been held by authorities binding on me, which nobody has sought to question, that the effect of that is that, by reason of the Law

of Property Act, 1925, s. 34 (3), the gift is to operate as a gift to trustees on the statutory trusts set out in sect. 35 of that Act.

Upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment [of certain outgoings] upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons . . . interested in the land. A

Accordingly, I have to read this will as if it contained a provision creating a trust in those words, so far as relates to leaseholds. Further, in view of the Law of Property Act, 1925, s. 25, I have to read in a power to postpone the sale, and, having regard to sect. 28 (2) of that Act, I have further to read in a provision that the net rents and profits of the leaseholds until sale are to be applied B

. . . in like manner as the income of investments representing the purchase money . . .

would be payable if a sale had been made.

Reading all those in together, it appears to me that I am bound to treat this case as a case on all fours with *Re Brooker, Brooker v. Brooker* (2), and to say that the circumstance that here the trust for sale is read in by virtue of the Act does not differentiate the case from *Re Brooker, Brooker v. Brooker* (2), where the trust for sale and the power to postpone were expressly stated in the will. I hope I am stating the argument to the contrary fairly if I put it in this way. It is said that, under sect. 35 of the Act, which provides, in effect, that I am to read into the will a trust to sell and to stand possessed of the net proceeds of sale and the net rents and profits until sale on such trusts as may be requisite for giving effect to the rights of the persons interested, I must treat the rights of the persons interested as *ipso facto* involving a right in the remaindermen to claim that the rule in *Howe v. Dartmouth (Earl)* (1) should be applied. I cannot for myself see that those words justify any such contention. In my view, I should be drawing too fine a distinction if, basing myself on that contention, I were to draw a distinction between the case where the trust for sale is expressed in the will and the case where the trust for sale has to be read into the will by virtue of the provisions of the Law of Property Act, 1925. C
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Solicitor: *Herbert Oppenheimer* (for all parties).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

WELCH v. ROYAL EXCHANGE ASSURANCE.

[COURT OF APPEAL (Slessor, MacKinnon and Finlay, L.JJ.), **October 26, 27, 28, November 11, 1938.**]

A *Insurance—Fire insurance—Claim—Proof and particulars—Conditions precedent—Compliance within a reasonable time—Banking accounts only disclosed on cross-examination.*

The claimant was insured with the defendants against fire, and the policy contained a condition which, so far as its nature permitted, was deemed to be a condition precedent to the right of the insured to recover thereunder. By that condition, the insured was to give to the insurers all such proofs and information with respect to any claim as might reasonably be required. The insured in fact operated and controlled banking accounts in the name of his mother, and, despite repeated requests for information as to his banking accounts both before and in the course of arbitration proceedings, did not disclose these accounts until he was cross-examined in the arbitration. It was contended that the withholding of this disclosure until so late a period in the proceedings was a breach of the above condition :—

HELD : (i) upon the proper construction of the condition, the insured was bound to give the required particulars within a reasonable time of being asked to do so. If he did not do so, and, in the above circumstances, he had not done so, he was barred from recovering under the policy.

D (ii) (*per* MACKINNON and FINLAY, L.JJ., SLESSER, L.J., *dubitante*) this condition was a condition precedent.

Decision of BRANSON, J. ([1938] 1 All E.R. 451) affirmed.

[EDITORIAL NOTE. The question here is whether the insured must give the required information within a reasonable time of the request for it, or whether it is sufficient compliance with the condition if the information is ultimately given.

E It will be noted that, according to the terms of the condition, the result of non-compliance with it is to bar completely any recovery under the policy, but, despite this, it is held that the required particulars must be given within a reasonable time.

AS TO PROOF OF CLAIM, see HALSBURY, Hailsham Edn., Vol. 18, p. 462, para. 683 ; and FOR CASES, see DIGEST, Vol. 29, pp. 332-335, Nos. 2696-2715.]

F Cases referred to :

(1) *Weir v. Northern Counties of England Insurance Co.* (1879), 4 L.R.Ir. 689 ; 29 Digest 332, case 2699 xi.

(2) *Worsley v. Wood* (1796), 6 Term Rep. 710 ; 29 Digest 334, 2706 ; *reussg.* (1795), 2 Hy. Bl. 574.

(3) *London Guarantie Co. v. Fearnley* (1880), 5 App. Cas. 911 ; 29 Digest 412, 3236 ; 43 L.T. 390.

G (4) *Re Bradley & Essex & Suffolk Accident Indemnity Society*, [1912] 1 K.B. 415 ; 29 Digest 404, 3197 ; 81 L.J.K.B. 523 ; 105 L.T. 919.

(5) *Stoneham v. Ocean Ry. & General Accident Insurance Co.* (1887), 19 Q.B.D. 237 ; 29 Digest 402, 3183 ; 57 L.T. 236.

(6) *Oldman v. Bewicke* (1786), 2 Hy. Bl. 577, n. ; 29 Digest 334, 2705.

H (7) *Roper v. Lendon* (1859), 1 E. & E. 825 ; 29 Digest 332, 2701 ; 28 L.J.Q.B. 260.

(8) *Cingmars v. Equitable Insurance Co.* (1857), 15 U.C.R. 143 ; 29 Digest 332, case 2699 v.

APPEAL from a decision of BRANSON, J., dated Jan. 28, 1938, and reported [1938] 1 All E.R. 451. The facts are fully set out in the judgment of SLESSER, L.J.

Norman Birkett, K.C., and *R. E. Borneman* for the appellant.
Philip Vos, K.C., and *A. S. Wilson* for the respondents.

Birkett, K.C. : The judge was wrong in holding that all clauses in this policy are to be construed as conditions precedent to a right to claim under the policy. It is only a bar to payment, not to the right to claim. When judgment was delivered, every condition had been fulfilled. The word "unless" in this clause means "until." If words are ambiguous, they must be construed against the insurance company. [Counsel referred to *Weir v. Northern Counties of England Insurance Co.* (1), *MACGILLIVRAY ON INSURANCE LAW*, 2nd Edn., p. 1163, *Re Bradley & Essex & Suffolk Accident Indemnity Society* (4) and *Stoneham v. Ocean Ry. & General Accident Insurance Co.* (5).] A B

Borneman followed.

Vos, K.C. : There is no question here of avoiding the policy, but only of avoiding payment of this claim. The rights of the parties are crystallised at the date of the issue of a writ, or at the date of submission to arbitration. At that time, disclosure had not been made. The question is whether or not a breach of this condition constitutes a bar to payment. If it does, what was done after the breach is irrelevant. [Counsel referred to *MACGILLIVRAY ON INSURANCE LAW*, 2nd Edn., p. 397, *RICHARDS ON THE LAW OF INSURANCE*, p. 492, *Worsley v. Wood* (2), *Oldman v. Bewicke* (6), *Roper v. Lendon* (7), *London Guarantie Co. v. Fearnley* (3), *Cingmars v. Equitable Insurance Co.* (8), *Re Bradley & Essex & Suffolk Accident Indemnity Society* (4) and *Stoneham v. Ocean Ry. & General Accident Insurance Co.* (5).] D

Borneman, in reply : No case has been cited on all fours with the present one. If *Worsley v. Wood* (2) is right, *Re Bradley & Essex & Suffolk Accident Indemnity Society* (4) was wrongly decided. One cannot give two meanings in the same document to the words : "No claim under this policy shall be payable unless . . ." In *Cingmars v. Equitable Insurance Co.* (8), there was a refusal to give information, and that refusal was persisted in. That was not so here. The right of action accrued when the fire broke out. The appellant had complied with all the conditions when the defendants asked for leave to amend. [Counsel referred to *London Guarantie Co. v. Fearnley* (3), *Stoneham v. Ocean Ry. & General Accident Insurance Co.* (5) and *Oldman v. Bewicke* (6).] E F G

SLESSER, L.J. : In this appeal, which is from a judgment of *BRANSON, J.*, given by him on a special case from an award of an arbitrator, the judge has come to the conclusion that the arbitrator was right in holding that a failure of the assured to deliver information reasonably required by the insurance company under a condition of the policy disentitled the claimant to recover any sum in respect of his claim concerning a fire on Nov. 26, 1934, under the fire policy, and that the fact that the respondents were in possession of the required information at the time when they amended their points of defence did H

not preclude them from relying on the claimant's failure to supply such information at an earlier date as a bar to his right to recover any sum in respect of his claim.

The material facts of this case are that the respondents alleged, in their first defence of Dec. 2, 1935, in answer to the points of claim, that
 A the claim on the policy was fraudulent in that each and every item thereof was fraudulently exaggerated and that false representations had been made in the stock sheets. No complaint was then made of the wrongful withholding of information. During the hearing before the arbitrator, it was for the first time relied upon by the insurance company
 B that the claimant had failed to give the respondents any information which was reasonably required with respect to two banking accounts of his mother which had been used and controlled by the claimant for the purpose of his business, and that large sums of money accruing to the claimant had been paid by him into the accounts and large sums drawn
 C out of the accounts by him for the purposes of his business. At the arbitration, in the course of the cross-examination of the claimant, the claimant, for the first time, offered to give, and did give, full information as to these two banking accounts, but the arbitrator finds that, until the accounts were so produced, the respondents were not in possession
 D of sufficient information to enable them to allege that the claimant's failure to give information in respect of those accounts was a breach of condition 4 of the policy, which provides as follows :

On the happening of any destruction or damage the insured shall forthwith give notice thereof in writing to the corporation, and shall within 30 days after such destruction or damage or such further time as the corporation may in writing
 E allow, at his own expense, deliver to the corporation a claim in writing containing as particular an account as may be reasonably practicable of the several articles or portions of property destroyed or damaged and of the amount of destruction or damage thereto respectively, having regard to their value at the time of the destruction or damage, together with details of any other insurances on any property hereby insured. The insured shall also give to the corporation all such proofs and information with respect to the claim as may reasonably be required together
 F with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. No claim under this policy shall be payable unless the terms of this condition have been complied with.

The respondents then on June 1, 1937, during the hearing, obtained leave to amend their defence, and pleaded, alternatively, in breach of condition 4, that the assured, although requested to do so, refused and
 G failed to give to the corporation such proofs and information with respect to the claim as were reasonably required, and fraudulently concealed from the respondents such proofs and information. The arbitrator found, first, that there was no fraudulent concealment, but that the information as to accounts was reasonably required by the respondents within the
 H meaning of condition 4. He further found that the accounts, when disclosed, did not contain any material which justified, or tended to justify, the respondents in repudiating the claim under the policy. The arbitrator also states that information concerning all bank accounts used and controlled by the claimant for the purposes of his business was required by the respondents before the arbitration proceedings were begun, and,

in a finding which I have already quoted, has come to the conclusion that, until such accounts were produced, the respondents were not in possession of sufficient information to allege the claimant's failure to give information. In these circumstances, I think that it is not possible for the appellant to be heard to say that, when the claim was first submitted, no reliance was placed upon the assured's failure to give information, and that, as such information was in fact given during the arbitration proceedings before the pleadings were amended, it was given in time, for the arbitrator has found against the claimant on this head, saying that, if the information had been given within a reasonable time of its first demand, the respondents might have raised an issue under condition 4 of the policy from the outset, and that their failure so to do may well be ascribed to the inaction of the appellant himself.

In these circumstances, even if the requirement of information in condition 4 is not a condition precedent, but is merely a condition that the insurance company need not pay until the information required in condition 4 is provided, the appellant fails, because he cannot say that such information was in fact given before the claim was made, and, therefore, it becomes, to my mind, unnecessary in this case to determine whether the failure to comply with condition 4 as to information was a failure to satisfy a condition precedent. For myself, I would wish to keep open that question. Had the phrase at the end of condition 4 been "no claim under this policy shall be payable *until* the terms of this condition have been complied with," instead of the word "unless," the case would have resembled that of *Weir v. Northern Counties of England Insurance Co.* (1), where it was held that such words did not constitute a condition precedent, but only a requirement to be satisfied before a liability to pay arose, but it may well be said that here the word "unless" has no such temporal limitation.

In the result, I think that this appeal should fail, not upon the ground that condition 4 is a condition precedent, but upon the ground of the claimant's failure to give necessary information before a claim was made by him, which failure the appellant, in the circumstances of this case, is unable to excuse.

MACKINNON, L.J.: The appellant was insured by a fire insurance policy issued by the respondents dated June 19, 1929. The policy was for £25,714 on certain buildings and on stock in trade. By virtue of renewals, the policy was in force on Nov. 26, 1934, upon which day a fire occurred in some of the premises insured. The assured put forward a claim on the policy. In the course of investigating this claim, the agents of the insurers asked the assured to produce for their inspection certain banking accounts of Mrs. Welch, mother of the appellant. The appellant refused to produce them, alleging that his mother was not willing to allow him to do so, and that he had no power to compel her. Clause 11 of the conditions on the back of the policy provided that, in

case of any disputed claim, it should be referred to arbitration. Sir Walter Monckton, K.C., was appointed sole arbitrator. Pursuant to his direction, points of claim, dated Nov. 9, 1935, were delivered by the appellant. These asserted a claim for the defendants' proportion (there being other concurrent insurances) of a loss of £41,383. The respondents'

- A points of defence of Dec. 2, 1935, relied on condition 5 of the policy. This provides that, if any claim is fraudulent, or if any fraudulent means or devices be used to obtain anything on the policy, all benefit under it shall be forfeited. It was alleged that the claim was fraudulent, and that fraudulent devices had been used, and that the respondents were, B therefore, liable for nothing. The arbitrator has found that this charge of fraud was not established. He has also found that there was a genuine loss by fire of the insured subject-matter, and has found that this loss amounted to £32,000, in place of the figure of £41,383 in the claim.

- In the course of the appellant's evidence at the arbitration, he was C asked in cross-examination about Mrs. Welch's bank accounts. His counsel thereupon offered to produce them, and they were produced. The arbitrator finds that these accounts were used and controlled by the appellant for the purposes of his business. This, of course, means that his previous refusal to produce them on the ground that he had no control D over them was quite unjustifiable. Mrs. Welch's pass-books having been thus produced, the respondents asked the arbitrator for, and were granted, leave to amend their points of defence. By that amendment, delivered on June 8, 1937, the respondents relied on condition 4 of the policy. The terms of that I must examine in more detail later. In effect, how- E ever, it requires the assured who is making any claim to furnish all such proofs and information as may be reasonably required by the company. The pleading went on to allege that in breach of this condition the appellant had fraudulently concealed these banking accounts, and that his assertion that he had no control over these accounts was fraudulent, F in that it was false, and false to his knowledge. The arbitrator has found that this charge of fraud was not established, though he has found, as I have said, that the assertion that the appellant did not control these accounts was untrue. In other words, it was untrue, but not deceitful.

- The claim that, by reason of fraud, the appellant had forfeited all G benefit under the policy having been thus decided in his favour, the remaining question is whether or not, upon the construction of the policy, the respondents are liable for their proportion of the loss of £32,000. The promise of indemnity on the front of the policy is expressed to be :

- H Subject to the conditions contained herein or indorsed or otherwise expressed hereon, which conditions shall, so far as the nature of them respectively will permit, be deemed to be conditions precedent to the right of the insured to recover hereunder.

Condition 4, on the back of the policy, reads as follows :

On the happening of any destruction or damage the insured shall forthwith give notice thereof in writing to the corporation, and shall within 30 days after

such destruction or damage or such further time as the corporation may in writing allow, at his own expense, deliver to the corporation a claim in writing containing as particular an account as may be reasonably practicable of the several articles or portions of property destroyed or damaged and of the amount of destruction or damage thereto respectively, having regard to their value at the time of the destruction or damage, together with details of any other insurances on any property hereby insured. The insured shall also give to the corporation all such proofs and information with respect to the claim as may reasonably be required together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. No claim under this policy shall be payable unless the terms of this condition have been complied with. A

The argument for the respondents is: "We reasonably required you to produce these bank accounts as proofs or information with respect to the claim. You refused, and, therefore, failed to comply with the terms of the condition. Therefore, in the terms of the condition, no claim is payable by us, and, by the provision on the face of the policy, compliance with our request was a condition precedent to your right to recover." The facts material to this argument are found thus by the arbitrator: (i) the information as to the bank accounts was reasonably required by the respondents; (ii) when they were disclosed, they did not contain any material which justified, or tended to justify, the respondents in repudiating the claim under the policy. This seems to mean that they afforded no sort of support to the respondents' charges of fraud against the appellant. I do not think that the arbitrator indicates any finding on the question whether they afforded him any material in assessing the amount of the loss, as he did, at the figure of £32,000. If they did not, apparently these accounts were of absolutely no importance, and even of no relevance in the case, though he finds that the respondents, before they saw them, had reason to think that they might be material, and, therefore, "reasonably required" their production. B C D E

The question, therefore, is whether the appellant, having acted stupidly and obstinately, but not dishonestly, is, upon the construction of the terms of the policy, debarred from any indemnity for this very serious loss. The arbitrator has upheld the contention of the respondents. BRANSON, J., in a very careful judgment, has agreed with him. After anxious consideration, I am constrained, with some regret, to agree with them. Numerous cases were cited to us in which similar questions have been considered, but in none was the question the same. This is solely a problem of the construction of this contract. Decisions as to the construction of other contracts, unless their wording is identical, are of small assistance. F G

The conditions at the back of the policy provide in seven places for events which may result in a loss of his right to indemnity by the assured. In conditions 1 and 2, there is provision for the policy being avoided. In conditions 5 and 7, "all benefit under the policy shall be forfeited." Condition 10 speaks of a claim being barred. Condition 11 speaks of the company not being liable for a claim. The one that is vital to this case, condition 4, says: H

No claim . . . shall be payable unless the terms of this condition have been complied with.

Mr. Norman Birkett urgently relied upon the greater rigour of a threat that "all benefit under the policy shall be forfeited" as compared with the provision that "a claim shall not be payable unless" something has been done. In regard to this argument, I think that it is material to observe that this policy was current from Apr., 1934, till Apr., 1935.

- A The fire with which we are concerned took place in Nov., 1934, but there might have been later fires in December, and in each of four succeeding months, on which claims might arise. If, in resistance to this November claim, the respondents could successfully rely on either of conditions 1, 2, 5 or 7, that would also relieve them in respect of all the later claims,
- B but if, as to this November claim, they could rely on condition 4 only, the assured, if he avoided the pitfalls of his contract, might still recover for the later claims.

- It was then argued that, in the last sentence of condition 4, "unless" should be construed as meaning "until." I do not think that this is
- C sound. I think that BRANSON, J., was right in saying that the last ten words of that sentence mean no more and no less than "if the terms of this condition have not been complied with." In truth, however, the more formidable argument for the respondents does not depend on the last sentence of condition 4. They say that the promise in the body
- D of the policy is "subject to the conditions which, so far as the nature of them permits shall be deemed to be conditions precedent to the right of the insured to recover." In condition 4, there is the provision that "the insured shall give all such information as shall reasonably be required." The nature of this does permit compliance with it to be a
- E condition precedent to the right of the insured to recover. It is found by the arbitrator that it has not been complied with. There has, therefore, been a breach of a condition precedent to the right of recovery.

- This argument does not involve reliance on the last sentence in condition 4, and might have been equally advanced if that last sentence
- F did not exist. The respondents need not rely upon it, or may treat it as merely a statement or warning as to the effect of what has been previously stipulated. The appellant, however, may rely on it as an ambiguous statement, controlling the effect of what has gone before, and therefore material on the question whether the nature of the stipu-
- G lation that the insured shall give all information reasonably required does permit it to be deemed a condition precedent to his right to recover. The appellant can also rely on the ancient principle that these provisions, inserted by the respondents in limitation of their promise of indemnity, must be construed *contra proferentes*. My duty to do that combines
- H with my inclination. None the less, I am driven to the conclusion that the stipulation that the insured shall give all such information as may be reasonably required is one the nature of which permits it to be a condition precedent to the right of the assured to recover, and that the presence of the last sentence in condition 4 does not by any ambiguity alter that nature or invalidate that conclusion.

Then it was said that this contention—namely, that, by failure to comply with condition 4, the assured had lost his claim to recover—was never in issue between the parties until the delivery of the amended defence upon June 8, 1937. In fact, upon that date the pass-books had been handed over, and the reasonable requirement to have them produced had, therefore, been complied with. On this, there is this A material finding by the arbitrator in para. 5 of the case :

Until the accounts were produced as aforesaid [during the appellant's cross-examination before the arbitrator] the respondents were not in possession of sufficient information to enable them to allege the claimant's failure to give information in respect of the said accounts as a breach of condition 4.

That finding shows, if anything were needed to show it, that the arbitrator B rightly exercised his discretion in allowing the respondents to amend their defence. In any case, he did allow the amendment. The appellant's claim in the arbitration was for a declaration that the respondents were liable to pay his claim. The amended defence was that he had failed to comply with a condition precedent to his right to recover. If this C situation had arisen in an action, the question whether he had a right to claim would have to be decided as things stood at the date of the writ, and in the arbitration I think that the same rule must apply. What should be taken to be the equivalent of the date of the writ may be not quite certain, but, whatever be such equivalent, it must be long before D the incident when the bank accounts were handed over during the appellant's cross-examination.

In the result, I think that this appeal fails. I have said that I arrive at that conclusion with some regret. The insurance company failed to establish any of their numerous charges of fraud. The arbitrator has E found that the assured ought to have produced these accounts, but that, when produced, they contained in fact nothing which justified, or tended to justify, a refusal to pay his claim. This means that the appellant had an honest claim for a large amount, but, by reason of his stupid obstinacy over an immaterial matter, he has enabled the respondents F to refuse to pay anything. To lose any sum, however large, may be the proper penalty of dishonesty. To lose some £20,000 as the result of stupidity does seem excessive, even if it be true that the claimant has only himself to blame for that result. Yet how many people are there, even among lawyers, who read through their fire insurance policies ? G Everyone knows that he must possess such a document, but knows that the chance of his needing to use it is remote. I agree that this appeal must be dismissed.

FINLAY, L.J. : I agree with the judgment of MACKINNON, L.J., H and I desire to add only a few sentences. I am not sure that I altogether share the regret which is expressed by MACKINNON, L.J., at being compelled to arrive at the conclusion at which he did arrive. We are, of course, entirely bound by the facts as they were found by the arbitrator. While it is quite clear that the arbitrator found (para. 2) that the allegation

that the claim was fraudulent was not made out, and further found (para. 8 (c), (d)) that the accounts were not fraudulently concealed from the respondents, and that the accounts, when disclosed, did not contain material justifying the respondents in repudiating the claim, it is also true (para. 4 (a), (b), (c)) that, not once, but on several occasions, the respondents required information about all the banking accounts, and that the claimant failed, until he was challenged on the matter in cross-examination, to disclose the two banking accounts in the name of his mother, which, of course, he must have known were in fact used and operated by him for the purposes of his business. Not wishing to be unsympathetic, I cannot for myself feel that it is unreasonable to think that a claimant who refuses to disclose information reasonably required, and persists in that refusal, may be regarded as being punished not entirely without reason.

I agree with MACKINNON, L.J., that the authorities are of little use upon a question of construction such as this. There is, however, one authority to which I may make a brief reference, *Worsley v. Wood* (2). The junior counsel for the appellant in his concise reply rather deprecated the importance of that case. It is perhaps enough to say that, in *London Guarantie Co. v. Fearnley* (3), LORD BLACKBURN, at p. 916, and LORD WATSON, at p. 918, both treat *Worsley v. Wood* (2) as being a case of the highest authority. In *Worsley v. Wood* (2), it was held by the Court of King's Bench that the condition in the policy in question was a condition precedent. If the terms of that policy are compared with the terms of the policy now in question, I think that some support is obtained for the construction which has been put upon the present policy by MACKINNON, L.J. I agree that the judgment of BRANSON, J., was correct, and that this appeal must be dismissed.

Appeal dismissed with costs. Leave to appeal.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *William Charles Crocker* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

Re VAUX, NICHOLSON v. VAUX.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.J.J.),
October 19, 20, November 11, 1938.]

*Wills—Perpetuities—Discretionary trust for children and grandchildren—
“Within the limitations prescribed by law”—Validity.*

The testator by his will gave the income of his residuary estate unto his widow until death or re-marriage, and after her re-marriage he gave her an annuity of £500 per annum. Subject thereto, the trustees were to set aside £20,000 for each of his daughters living at his death or born in due time thereafter, and these sums were settled in the usual way. The trustees were then given full discretion to deal with the capital and income of the residue in favour of the children and issue of deceased children. The will continued: “And I declare

that my trustees may from time to time within the period of 21 years from my decease accumulate the surplus of any income of my residuary trust fund not paid or applied under the preceding clause of this my will by investing the same and the resulting income thereof to the intent that the accumulations shall be added to the residuary trust fund and follow the determination thereof with liberty nevertheless for the trustees at any time or times to resort to the accumulations of any preceding year or years and apply the same as part of my residuary trust fund." This clause was admittedly void for perpetuity, but it was contended that that result was prevented by the following clause, which, it was contended, must be read with the preceding clause. The following clause was in these terms: "Having the fullest confidence in my trustees I hereby authorise and empower them to deal with the capital and income of my residuary trust fund and pay away and deal with the same in all respects for the benefit and provisions of my children or grandchildren as they may think best or most expedient and to act in all respects as I could have done if living save only that all such dealings with the residuary trust fund and the income and accumulations thereof shall be within the limitations prescribed by law"—

HELD: as the second clause, which must be construed as a separate disposition from the preceding clause, did not extend to issue more remote than a grandchild, the possible interests, having regard to the saving words, must necessarily vest within the period allowed by the rule against perpetuities. The saving words were equivalent to a proviso that the trustees should not create by the exercise of the power any interest which, if given by the testator in his will, would have been obnoxious to the rule against perpetuities.

Decision of SIMONDS, J. ([1938] 2 All E.R. 177) varied on this point.

EDITORIAL NOTE. It was contended that the second of these two clauses was so wide in its term that it gave the trustees a power to write a will for the testator, and that it was, therefore, void as being too vague. The Court of Appeal, however, have pointed out that the clause refers only to children and grandchildren, and have treated it as a special power of appointment, the validity of which must be tested by asking the question whether, if the interest had been conferred by the testator in his will, it would have been obnoxious to the rule. By treating the clause in this way, the court have been able to find that the saving words prevent the clause from being contrary to the law against perpetuities.

AS TO REFERENCES TO RULE AGAINST PERPETUITIES IN INSTRUMENTS, see HALSBURY, *Hailsham Edn.*, Vol. 25, pp. 105, 106, para. 195; and FOR CASES, see DIGEST, Vol. 37, pp. 70, 71, Nos. 114, 115.]

Cases referred to:

- (1) *Re Hargreaves, Midgley v. Tailey* (1889), 43 Ch.D. 401; 37 Digest 58, 27; 59 L.J.Ch. 384; 62 L.T. 473.
- (2) *Re Moore, Prior v. Moore*, [1901] 1 Ch. 936; 37 Digest 63, 66; 70 L.J.Ch. 358; 84 L.T. 501.
- (3) *Re Thompson, Thompson v. Thompson*, [1906] 2 Ch. 199; 37 Digest 56, 12; 75 L.J.Ch. 599; 95 L.T. 97.
- (4) *Pownall v. Graham* (1863), 33 Beav. 242; 37 Digest 63, 65.
- (5) *Re Neave's Settlement Trusts, Neave v. Neave*, [1938] Ch. 793; [1938] 3 All E.R. 220; Digest Supp. 159 L.T. 210.
- (6) *Re De Sommery, Coelenbier v. De Sommery*, [1912] 2 Ch. 622; 37 Digest 107, 414; 82 L.J.Ch. 17; 107 L.T. 253, 823.
- (7) *Cole v. Wade* (1807), 16 Ves. 27; 37 Digest 523, 1135.
- (8) *Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139; 43 Digest 874, 3188; 73 L.J.Ch. 74; 89 L.T. 604.
- (9) *Re Paul, Public Trustee v. Pearce*, [1921] 2 Ch. 1; 37 Digest 111, 436; 90 L.J.Ch. 446; 125 L.T. 566.

APPEAL from a judgment of SIMONDS, J., delivered Feb. 23, 1938, and reported [1938] 2 All E.R. 177, by which it was declared that the residuary trust fund of the testator was undisposed of, and passed as upon an intestacy.

A *H. A. H. Christie, K.C.*, and *J. G. Strangman* for the appellant, a son of the testator.

H. O. Danckwerts for the first respondent, one of the trustees of the will.

J. Norman Daynes, K.C., and *E. M. Winterbotham* for the second respondent, the testator's widow.

B *A. Grant, K.C.*, and *J. Leonard Stone* for the third and fourth respondents, the two daughters of the testator. They are objects of the discretionary trust, and also interested on an intestacy.

Christie, K.C. : The words in cl. 12 of the will limit those of cl. 11. The limits are the number of lives in being and a further period of 21 years.

C The lives must be ascertainable lives. Either cll. 11 and 12 of the will must be read together or each clause must stand alone. In the latter case, I do not mind whether cl. 11 stands or not. Clause 11 is the wider of the two. Clause 12 by itself is a perfectly valid provision. [Counsel referred to *Pownall v. Graham* (4).]

D *Daynes, K.C.* : Clause 12 is an investment clause, being a direction to the trustees. It has nothing to do with the beneficial interests. The language used shows that the testator was not giving anything beneficial, but was giving powers to the trustees, including powers to make a settlement, and that explains the words "the limitations prescribed by law."

E It is a noteworthy fact that cl. 11 defines the class of beneficiaries, and it is only when the testator adds certain powers by cl. 12 that he adds the warning that the provisions of cl. 11 must be kept within the limitations required by law. There cannot be a good power growing out of a bad trust. That depends upon whether or not cl. 12 extends the powers

F conferred upon the trustees by cl. 11. If cl. 12 is to be considered an independent clause, it is so wide that the testator is saying that the trustees can make a will for him. If cl. 12 is a power which is ancillary to cl. 11, it is a power which grows out of a bad trust. If it were merely a power to appoint among children and grandchildren, it would be valid,

G but it goes beyond that, and attempts to put the trustees into a position which would enable them to make any provision which the testator himself could make. An ordinary power would not give powers to the trustees to make a settlement. It is an unusual clause, but it may not be so unusual if it is merely intended to amplify cl. 11. Therefore, I suggest

H that cl. 12 is not an independent clause, and, if cl. 11 falls, cl. 12 falls with it. If the true view of the reference to the testator's fullest confidence in his trustees is that the trustees are limited to the original trustees, the power could not now be exercised, as the power is not given to the holder of an office but to the particular trustees named by the testator. This power would be absolutely void if one treated the words in cl. 12 as

applying to the trustees for the time being. The question then is whether or not the exercise of the power is confined within the rule by the use of the words "within the limitations prescribed by law." The question is whether the testator has sufficiently indicated the period within which the power may be exercised. In dealing with the rule against perpetuities, it is for the testator to select the line. The law does not step in, but the testator himself must select the line. [Counsel referred to *Re Neave's Settlement Trusts*, *Neave v. Neave* (5), *Re De Sommery*, *Coelenbier v. De Sommery* (6), *Cole v. Wade* (7), *Re Smith*, *Eastick v. Smith* (8) and *Pownall v. Graham* (4).] A

Winterbotham: When one is dealing with a limitation created under a power, one only has to predicate the date from the exercise of the power. If the testator gave property to vest 23 years after his death, it would be void, but if he gave a life interest to his wife with power to appoint to his children, and if after four years she appointed to all children who attained the age of 24, it would be perfectly valid. If the testator in the present case had put in a limitation that the property should vest in the grandchildren living at the end of the period allowed by the rule against perpetuities, one could say, on the principle of *Re Moore*, *Prior v. Moore* (2), that that was not a valid disposition. [Counsel referred to *Re Thompson*, *Thompson v. Thompson* (3) and *Re Paul*, *Public Trustee v. Pearce* (9).] B C D

Grant, K.C.: Clause 11 is admittedly bad. No one has suggested that cl. 11 has any validity. The question then arises as to what cl. 12 is. Either it is a new gift or it is a limitation. If it is a new interest following upon cl. 11, it falls within the rule that any gift following upon a gift which is void within the rule against perpetuities is itself void, notwithstanding that it might not be void otherwise. A limitation upon a remainder, itself bad as infringing the rule, is also bad. Clause 11 being void, the power which operates to assist it is itself void, and falls with it. SIMONDS, J., was right when he said that cl. 12 could not stand by itself as an independent disposition. The reasons are either that it is a disposition following upon the disposition in cl. 11, or that it is a power intended to assist the trustees in carrying cl. 11 into effect, in which case it is equally bad. E F

Strangman: With regard to the point that cl. 12 is a power arising out of a bad trust, either the two clauses must be read together, in which case the proviso at the end of cl. 12 governs the whole, or cl. 12 can be read alone. The power can be exercised only in favour of children or of grandchildren, and in every case when the power comes to be exercised it must be certain whether or not the exercise is a valid exercise, and whether or not it is within the power. G H

CLAUSON, L.J. [delivering the judgment of the court]: Colonel Ernest Vaux died on Nov. 25, 1925, leaving a widow, two sons, and two daughters. All the children attained the age of 21 years. One son, Ernest, died

in 1936, after attaining the age of 21 years. The widow and the other three children are living. By his will, dated Nov. 27, 1919, the testator appointed his executors and trustees, and devised his real estate and the residue of his personal estate to his trustees upon the usual trusts for sale, conversion and investment. He gave his wife a life interest liable to be cut down on her re-marriage (an event which has not occurred), and he directed the appropriation of two sums of £20,000 for each of his daughters. He then proceeded to dispose of the residue of his residuary trust funds in terms which are contained in cl. 11 and 12 of his will. The present trustees of the will are two of the trustees named therein, together with Frank Douglas Nicholson.

The present appeal is from an order of SIMONDS, J., dated Mar. 16, 1938, declaring that the residuary trust fund is undisposed of and devolves as upon an intestacy, and that decision is based upon the terms of cl. 11 and 12 of the will. The provisions of cl. 11 of the will are as follow :

And as to the rest residue and remainder of my residuary trust fund I declare that my trustees shall hold the same upon trust to pay and apply both the income and capital thereof in such shares and proportions as they may in their absolute and uncontrolled discretion think fit to or for the benefit of all or any one or more of my children or the issue of any deceased child of mine and I declare that my trustees may from time to time within the period of 21 years from my decease accumulate the surplus of any income of my residuary trust fund not paid or applied under the preceding clause of this my will by investing the same and the resulting income thereof to the intent that the accumulations shall be added to the residuary trust fund and follow the destination thereof with liberty nevertheless for the trustees at any time or times to resort to the accumulations of any preceding year or years and apply the same as part of my residuary trust fund.

It appears to have been admitted before SIMONDS, J., that the provisions of cl. 11 must be treated as void, and he so held, and we agree with that decision. In view of the problems arising from the following clause in the will, it is desirable to consider precisely upon what grounds cl. 11 of the will must be treated as void. It is to be observed that the trusts declared are discretionary trusts to be executed by "my trustees"—that is, as appears from the definition clause at the beginning of the will, the trustees or trustee for the time being of the will, whether original or substituted—and, accordingly, there is no such limitation on the period within which the discretion is to be exercised as there would have been had the discretion been vested in named persons, and in them alone. The trust is, accordingly, one under which, according to its terms, an interest can be created at a date more than 21 years after any life in being at the death of the testator. It follows that such a trust must be bad. The matter may be viewed in two alternative aspects. First, if the clause be regarded as creating a trust, it creates beneficial interests in the persons named, *scilicet*, the testator's children and issue, such interests not being absolute interests, but contingent, both as to existence and as to extent, upon the exercise of the trustees' discretion. If, as a matter of construction, a discretion may be exercised more than 21 years after the termination of any life in being at the creation of the

interest, no interest created under the discretion can fail to infringe the rule against perpetuities, since it cannot be predicated of the interest created by the testator's will (i.e., an interest contingent on the exercise of the trustees' discretion) that it must vest, if at all, not later than 21 years after some life in being at the creation of the interest, *scilicet*, at the death of the testator. Secondly, if the clause be regarded as creating a power in the trustees for the time being of the will to appoint the fund among the testator's children, or the issue of any deceased child of his, the case is one of a power which, according to its terms, can be exercised beyond the limits of the rule against perpetuities, and under which an appointment can be made which would be too remote. It is well settled that the fact that within the terms of the power an appointment can be made which would be too remote does not render the power void if it is one which cannot be exercised beyond the limits of the rule against perpetuities, but it is equally well settled that a power cannot be held to be valid if, according to its terms, it can be exercised by persons not necessarily ascertainable within the limits of the rule against perpetuities. This was held by this court in *Re Hargreaves, Midgley v. Tatley* (1), a decision which is binding on us, and which is, in our judgment, unquestionably in accordance with principle. Clause 12 which follows is in the following terms :

Having the fullest confidence in my trustees I hereby authorise and empower them to deal with the capital and income of my residuary trust fund and pay away and deal with the same in all respects for the benefit and provision of my children or grandchildren as they may think best or most expedient and to act in all respects as I could have done if living save only that all such dealings with the residuary trust fund and the income and accumulations thereof shall be within the limitations prescribed by law.

The judge took the view that this clause could not be read as limiting or cutting down cl. 11 so as to import into the trust conferred by cl. 11 a provision that any dealings with the residuary trust fund under that clause should be within the limits prescribed by the rule against perpetuities, and so far we do not see our way to differ from him. He, however, took the view that cl. 12 merely added a particular authority falling within the larger ambit of the trust created by cl. 11, and that it could not be construed as an independent effective provision. Here we part company with SIMONDS, J., on the question of construction. The two clauses are inartistically framed, but we are satisfied that cl. 12 is a provision which ought to be read as independent of, and additional to, cl. 11, and, accordingly, that its effectiveness in creating a valid trust or a valid power can properly be tested by a consideration of its language as an independent clause. It is to be observed in this connection that the class of beneficiaries mentioned in cl. 12—namely, children and grandchildren—is a different class from that mentioned in cl. 11, and that some of the beneficiaries mentioned in cl. 12—namely, grandchildren—might from time to time (that is to say, during the lifetime of their parent) be outside the class of beneficiaries mentioned in cl. 11.

It may be suggested, in the first place, that cl. 12, differing in this

respect from cl. 11, does not confer authority on the trustees for the time being of the will, but merely on the trustees named in the will. It is true that the words "having the fullest confidence in my trustees" might be held to indicate confidence in particular ascertained persons, and might afford a context sufficient to exclude the definition clause and to confine the meaning of the phrase "my trustees" to the actual persons named in the will. In view of the use of the phrase "my trustees" in the preceding cl. 11 and the subsequent cll. 13 and 14, we cannot accept this argument, and we feel bound to construe cl. 12 as conferring authority and power on the trustees for the time being of the will.

- B** Though of opinion that cl. 12 could not be treated as a provision independent of cl. 11, SIMONDS, J., nevertheless on the contrary assumption indicated his view that (a) a power exercisable by the trustees for the time being was void as being capable of being exercised beyond a period of lives living at the testator's death and 21 years thereafter, and
- C** (b) this defect is not cured by the words :

... save only that all such dealings with the residuary trust fund and the income and accumulations thereof shall be within the limitations prescribed by law.

- We agree, as we have already intimated, with the view that, apart from the saving words, the power given to the trustees by this clause must, as being given to the trustees for the time being of the will, be treated as invalid for remoteness. However, the question arises whether, on the construction of the clause as a whole, including the saving words, the power is not confined to a period which must necessarily terminate within the period of a life or lives in being at the testator's death and 21 years afterwards. It is to be observed that the objects of the power are confined to the class of children and grandchildren of the testator. The class does not extend to issue more remote than a grandchild. The possible beneficiaries must necessarily be in existence within the period of lives in being at the testator's death, but it is true that, apart from the saving words, the power, according to its terms, is exercisable within the lifetime of any grandchild, and so is exercisable during the whole of the life of a grandchild born just before the death of the testator's last surviving child, and, accordingly, if such a grandchild lives more than 21 years, during a period which may conceivably extend beyond any life or lives in being at the testator's death and 21 years thereafter.

- G** We turn now to the saving words. The word "dealings," whether or not it covers the act of exercise by the trustees of the power, must certainly be construed to cover the beneficial interest vested in the beneficiary in whose favour the power is exercised. The words are, in our judgment, equivalent to a direction that the beneficial interest vested in the beneficiary by any exercise of the power is to vest in the beneficiary, if at all, within the period of a life or lives in being at the death of the testator and 21 years thereafter.

In the case of a special power such as this, the validity of the interest appointed thereunder must be tested by asking the question whether,

if the interest had been conferred by the testator in his will, it would have been obnoxious to the rule against perpetuities. The saving words appear to us to be the equivalent of a proviso that no interest must be appointed to a beneficiary under this power which, if given by the testator in his will, would have been obnoxious to the rule against perpetuities. Let it be assumed that the saving words have been thus written out at length. The saving words would, if thus written out, necessarily seem to import that any appointment to be made under the clause must be made at a date which in fact falls within the period of a life or lives in being at the testator's death and 21 years afterwards, since the act of appointment must take place either at the moment at which the interest vests (if the appointment takes the form of an immediate gift) or at some date before the moment of vesting (if the appointment takes the form of an appointment to take effect on a future contingency). The matter may be made clearer by an example. Assume that, at a date more than 21 years after the death of the last surviving child of the testator, the then trustees in, let us say, the year 2070 exercise the power by handing £1,000 out of the fund to a then living grandchild of the testator. It may be admitted that the mere exercise of the power at that time could not be shown to be invalid, since it may then be impossible to prove that none of the human beings living at the testator's death is surviving or was surviving 21 years before. The interest appointed will, however, plainly be invalidly appointed, for, if the testator had by his will directed his trustees to hand £1,000 to some or one of his grandchildren living in the year 2070, such a direction would have been invalid, since it could not, as at the death of the testator in 1925, have been possible to predicate that the year 2070 (being the time when the interest would vest) would necessarily fall within the period of a life or lives in being at the testator's death and 21 years thereafter. The truth is that, if the words of saving, on their true construction, prevent the power being exercised so as to create an interest obnoxious to the rule against perpetuities, the result must necessarily be to restrict the exercise of the power to a period which falls within the limits of the rule.

There was, however, a further point raised in argument with which it is necessary to deal. It was suggested that the saving words were ineffective because they were too vague and uncertain. The limits of the rule cannot, so the argument ran, be regarded as something *in vacuo*. They must be construed by reference to some defined lives. Otherwise the limits of the rule are uncertain. Reference was made to *Re Moore, Prior v. Moore* (2), where JOYCE, J., held that a gift to continue until the "period of 21 years from the death of the last survivor of all persons who shall be living at my death" was void for uncertainty. The question whether the gift was void as a perpetuity was left undecided. It is no doubt necessary to consider whether the saving words, restricting, as they do, in our judgment, the period during which the power created

by cl. 12 is exercisable, may not be inoperative as imposing an uncertain—and, for that reason, void—restriction. In our judgment, the saving words are not void for uncertainty in the context in which they appear in this will. The saving words relate to the nature of the interest to be created, and have the effect of restricting the period for the exercise of the power by reference to the nature of the interest which it is permissible to appoint. The validity of the interest can be tested without any element of uncertainty being brought into the test, for the test is whether, if the interest as appointed had been given by the testator's will, it could have been predicated of it at the date of the testator's death that it must necessarily vest, if at all, within a period of a life or lives then in being and 21 years after. It is thus possible, without any uncertainty, to test whether the interest vests within the permissible period. As we have pointed out above, the power which creates such an interest must be exercised in creating that interest either at the moment at which the interest vests (which will be the case of a present immediate payment or gift in exercise of the power) or at some earlier date (as in the case of a disposition to take effect in the future). Accordingly, the restriction in regard to the time of the exercise of this power, having regard to the operation of the saving words upon the interest to be created, is always capable of being effectively tested, and the possibility of any uncertainty is thus eliminated.

We have only to add that it was ingeniously suggested in argument by Mr. Winterbotham that support for the argument against the validity of the power was to be found in the decision of JOYCE, J., in *Re Thompson, Thompson v. Thompson* (3). It is true that that case illustrates the principle that, while the validity in respect of perpetuity of an interest appointed in exercise of a special power is to be tested by reading it into the document creating the power, care must be taken, where the document exercising the power is an ambulatory document—for instance, a will—to read in the gift in the form in which it in fact operates when the ambulatory document becomes effective. The matter is dealt with at length in GRAY ON THE RULE AGAINST PERPETUITIES, 3rd Edn., ss. 523d, 523e. There is, however, in the present case, no question of the exercise of a power by an ambulatory document, and nothing in the case cited appears to us to throw any light on the present case. For these reasons, we propose to declare that cl. 12 of the will, according to its true construction, confers a valid power upon the trustees for the time being of the will to create any such interests in favour of children and grandchildren of the testator as, if created by the testator's will, would necessarily have vested, if at all, not later than 21 years after the expiration of some life in being at the testator's death.

Appeal allowed.

Solicitors : *Patersons, Snow & Co.*, agents for *Ranson & Co.*, Sunderland (for all parties).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

Re VARDON, BROWN v. VARDON.

[CHANCERY DIVISION (Farwell, J.), July 28, 1938.]

Executors—Gift of annuity—Estate insufficient to pay annuity—Application of rule in Re Cottrell—Partial intestacy—Adjustment of widow's rights.

A testator by his will made the following gifts: a specific devise, a pecuniary legacy, certain specific bequests of chattels, an annuity to his widow, and certain dispositions which were held to be inoperative. The result was that the executors were left with approximately £9,000 out of which to provide the annuity, the residue going as on an intestacy. The income of that sum was clearly insufficient to provide the annuity. The question was asked how the executors should deal with the estate:—

HELD: the executors should have the annuity valued and pay the capital value so ascertained to the annuitant. The widow was not entitled to any part of the income of the estate, but would be entitled on her death to the sum of £1,000, with interest at 5 per cent. from the date of the death of the testator. By agreement the widow was to receive this £1,000 at once in order to save the estate bearing the interest payable thereon. The income of the estate during the life of the widow must be applied in recouping to capital as far as possible the value of the annuity paid to the widow.

[EDITORIAL NOTE.] In dealing with the annuity, the principle of *Re Cottrell, Buckland v. Bedingfield* (1) has been applied. Upon the intestacy, the widow, in the absence of issue, would be entitled to the income of the estate (here the remainder of the estate after the effective provisions of the will have been complied with), but, having been given the advantage of receiving the capital value of her annuity, she is required to forgo that income, and it is to be applied in replacing to some extent the capital taken out of the estate by the payment of the capital value of the annuity.

AS TO PAYMENT OF VALUE OF ANNUITY, see HALSBURY, *Hailsham Edn.*, Vol. 28, pp. 189, 190, para. 347; and FOR CASES see DIGEST, Vol. 39, pp. 124-126, Nos. 178-196.]

Cases referred to:

- (1) *Re Cottrell, Buckland v. Bedingfield*, [1910] 1 Ch. 402; 39 Digest 126, 195; 79 L.J. Ch. 189; 102 L.T. 157.
- (2) *Re Grant, Walker v. Martineau* (1883), 52 L.J. Ch. 552; 39 Digest 173, 633; 48 L.T. 937.

ADJOURNED SUMMONS asking for the determination of the rights of the widow in the following circumstances. Henry William Vardon, the deceased, by his will, made on Nov. 28, 1936, after appointing his wife and the plaintiff the executors and trustees thereof, made a specific devise of his house, gave legacies of £200 and certain chattels and an annuity of £400 to his widow during her life, and concluded with certain dispositions which were held by BENNETT, J., to be ineffective. The deceased therefore died intestate as to all his estate except that mentioned above. He left a widow but no issue, the persons entitled to share in his estate under the Administration of Estates Act, 1925, in addition to the widow, being his brothers and his nephews and nieces.

The estate of the deceased, apart from the above specific gifts other than the annuity, amounted to about £9,000, which was insufficient, if invested in trustee securities, to provide the annuity. The value of the

annuity was about half that amount, so that, if the widow were paid the value of the annuity, the sum of over £4,000 would remain in the hands of the executors, distributable as on an intestacy. The question for determination, therefore, was how the annuity should be dealt with, and how the interest of the widow upon the intestacy should be provided for, as the parties desired to pay her her £1,000 and interest immediately.

E. M. Winterbotham for the plaintiff.

H. L. A. Hart for the defendant Mrs. Jessie Vardon.

M. R. C. Overton for the defendant A. J. Vardon.

R. O. Wilberforce for the defendant Mrs. Marett.

B Gerald R. Upjohn for the defendant E. T. Vardon and others entitled on the partial intestacy.

FARWELL, J. : In this case, the income of the estate being insufficient to pay the whole of the annuity in full, I think that the principle in *Re Cottrell, Buckland v. Bedingfield* (1) ought to be applied. Accordingly, the widow is entitled to the actuarial value of that annuity. It has been argued by Mr. Wilberforce that that is not so, and that the decision in *Re Grant, Walker v. Martineau* (2) is an authority to the contrary which I ought to follow. I think that the facts in *Re Grant, Walker v. Martineau* (2) are not similar to those in this case, and, without throwing any doubt on *Re Grant, Walker v. Martineau* (2), I am of opinion that I ought to apply the principle in *Re Cottrell, Buckland v. Bedingfield* (1), and I propose to do so.

In this case, the capital is insufficient to pay the legacy and provide a sum to produce the income of the annuity given to the widow. The legacy has been paid in full, and, in order to adjust the rights of the various parties, I have decided that the right course for the executors to adopt is to have the annuity valued and to pay to the annuitant the capital value so ascertained. However, the effect of that cannot be, in my judgment, to give to the annuitant, the widow, something more than that which she could have got on the footing that the estate was insufficient. I think, therefore, that it is necessary, in order to complete the adjustment of the rights of the parties as far as possible, having regard to the fact that I have applied the principle of *Re Cottrell, Buckland v. Bedingfield* (1), that I should hold that the widow is not entitled to any part of the income of the estate which is undisposed of. That income must be applied during her life to recoup to capital as far as possible the sum which has been taken out of capital by the application of the rule in *Re Cottrell, Buckland v. Bedingfield* (1). This would mean that on her death she would get £1,000, with interest at 5 per cent. However, the parties are willing that £1,000 with interest at 5 per cent. down to the date of payment should be paid to the widow now. She will therefore get that sum immediately. Beyond that, the income of the estate, so far as it is not already disposed of by the application of *Re Cottrell, Buckland v. Bedingfield* (1), cannot be paid to her in addition to what she has already

received. It must be applied in recouping to capital the sum which has been taken out of capital by the application of that rule. The position is a curious one. In a sense, it is an artificial one, because the application of the rule in *Re Cottrell, Buckland v. Beddingfield* (1) here gives rise to difficulty. In my judgment, it is not possible that the widow should be entitled to the benefit of the principle laid down in that case, and that by that means she should get a benefit she could not otherwise have got. The only way in which the matter can be fairly adjusted is the way I have said, and I propose to make a declaration to that effect. A

Solicitors: *Wordsworth, Marr Johnson & Shaw* (for the plaintiff and for all defendants other than the second defendant); *Gibson & Weldon*, agents for *Sinnott & Willway*, Bristol (for the second defendant). B

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re A DEBTOR (No. 38 OF 1938), DEBTOR v. PETITIONING CREDITORS AND OFFICIAL RECEIVER. C

[CHANCERY DIVISION (Farwell and Morton, JJ.), **October 31, November 14, 1938.**]

Sale of Goods—Oral contract—Acceptance—Acceptance within the Sale of Goods Act, 1893, s. 35—Sufficiency—Sale of Goods Act, 1893 (c. 71), ss. 4 (3), 35. D

On Mar. 3, 1938, the brother and authorised agent of the appellant orally ordered from the respondents 5 kitchen fittings. Shortly after, the appellant made entries in his purchases day book and in his bought ledger recording the order and the price of the goods. On Mar. 18, the goods were delivered at the appellant's premises and received by an employee of the appellant, and remained there until after Apr. 12, 1938. On Apr. 12, 1938, the respondents presented a petition in bankruptcy against the appellant upon which the receiving order here appealed against was made. Apart from the debt in respect of the above goods, the amount due to the petitioning creditors was under £50. It was contended that there was no enforceable contract in respect of these goods, because there had been no sufficient acceptance of the goods within the meaning of the Sale of Goods Act, 1893, s. 4:— E

HELD: once there has been an acceptance within the meaning of the Sale of Goods Act, 1893, s. 35, and the facts herein amounted to such an acceptance, the requirements of sect. 4 have been complied with. The object of sect. 4 (3) is to provide that a contract may be enforceable if the requirements therein stated are complied with, even though there may be no acceptance within the meaning of sect. 35. F

[EDITORIAL NOTE. The contention in this appeal is solely concerned with the Sale of Goods Act, 1893, ss. 4 (3), 35. Sect. 35 is a definition of the term "acceptance," and sect. 4 (3) states that there is an acceptance of goods within the meaning of sect. 4 when the buyer does any act in relation to the goods recognising a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not. It was argued that sect. 4 (3) was a specific definition of the term "acceptance" for the purposes of sect. 4, and that therefore the definition given in sect. 35 must be excluded when construing sect. 4. The court did not accede to this view, holding that subsect. (3) was to be read as additional to the definition of acceptance in sect. 35. This addition is, of course, confined to sect. 4. G H

AS TO ACCEPTANCE OF GOODS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 28-30, paras. 27-30; and FOR CASES, see DIGEST, Vol. 39, pp. 369-377, Nos. 84-161.]

A APPEAL from a receiving order against the appellant made by the registrar of the Croydon County Court on July 8, 1938, on the petition of Peerless Kitchen Cabinets, Ltd. The facts are fully set out in the judgment of FARWELL, J. The only material question upon the appeal was whether there was an acceptance of the goods within the meaning of the Sale of Goods Act, 1893, s. 4, the sale of the goods not being the subject of a memorandum in writing.

B The Sale of Goods Act, 1893, ss. 4 (3), 35, provides as follows :

4. (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of the sale whether there be an acceptance in performance of the contract or not.

C 35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

H. J. Astell Burt for the appellant, the debtor.

Eric Sachs, K.C., and G. F. Kingham for the respondents, the petitioning creditors.

D

FARWELL, J. [delivering the judgment of the court]: The relevant facts are these. The appellant, a builder, in the early part of the present year was occupied in converting two houses in Croydon into six flats. The respondents are manufacturers and suppliers of certain kitchen fitments. On Mar. 3, 1938, the brother and authorised agent of the appellant, orally ordered from the respondents 5 kitchen fitments to be made and delivered to the appellant at the place where the work of converting the houses into flats was in progress. The respondents orally accepted the order. Shortly after the order had been given, the appellant made entries in his purchases day book and in his bought ledger recording the order and the price of the goods, which amounted to £65 14s. 2d. On Mar. 18, 1938, the respondents duly took the goods to the appellant's premises. There is no evidence that the appellant was present on that occasion, but the man in charge of the goods to be delivered was referred by the appellant's foreman to an employee of the appellant, who received the goods and had them deposited on the appellant's premises. The goods in question were of considerable size, and were delivered without any packing or covering of any sort. They remained on the appellant's premises until after Apr. 12, 1938. On E Mar. 29, the appellant executed a deed of assignment for the benefit of his creditors. The deed did not in terms exclude from the property assigned the particular goods in question. On Apr. 12, the respondents presented the petition on which the receiving order appealed against was made. The appellant and respondents had had other dealings prior to the particular order in question, but the total indebtedness of the

appellant to them, excluding these 5 kitchen fitments, was under £50, and it was conceded by counsel for the respondents that, if the transaction relating to these goods did not result in an enforceable contract, the debt due to them was under £50, and no receiving order could be made. The question, therefore, for the registrar was whether or not there was an enforceable contract between the parties with regard to these kitchen fitments. The registrar held that there was an enforceable contract, and accordingly made the receiving order. A

The question for the decision of this court is whether or not that order was rightly made. It is admitted that the order for the goods was given orally by the appellant and accepted orally by the respondents, and that the goods were delivered at the appellant's premises and received by his employee and deposited on his premises, where they remained until after Apr. 12 without objection from the appellant, and with no suggestion or repudiation of the contract by him. There is, however, no evidence that he was himself aware that the goods had been delivered or were deposited on his premises. In these circumstances, it is said, on behalf of the appellant, that, having regard to the Sale of Goods Act, 1893, s. 4, there is not, and never was, an enforceable contract in respect of those goods. In our judgment, that contention is not well-founded. Sect. 4 (1) provides that a contract for the sale of goods of the value of £10 or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold and actually receives the same, or (omitting the words in the section which do not apply in this case) unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf. Subsect. (3) provides that there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether or not there be an acceptance in performance of the contract. Acceptance is defined in sect. 35 of the Act, and, in our judgment, on the facts of this case, it is clear that there was "acceptance" of the goods within the meaning of that section. It is said, however, on behalf of the appellant, that acceptance within the meaning of sect. 35 is not sufficient to make the contract enforceable under sect. 4, that acceptance for the purpose of that section must be acceptance as defined by subsect. (3), and that, in the present case, there has been no such acceptance, because, although the acceptance and retention of the goods may have been within the scope of the agent's general authority, it was not within his authority to do any act on behalf of his principal that recognised a pre-existing contract. H

In our judgment, the answer to that contention is that, once there has been an acceptance within sect. 35, the requirements of sect. 4 have been complied with, and it is unnecessary to consider subsect. (3). The object of subsect. (3) is to provide that a contract may be enforceable if the requirements therein are complied with, even though there may be

no acceptance within the meaning of that word as defined in sect. 35. The appellant's contention involves reading into sect. 4 (3) the word "only" immediately before the words "when the buyer," and we can see no justification for so reading the subsection. Subsect. (3) and sect. 35 are in no way contradictory. If there is acceptance within the meaning of the later section, the requirements of sect. 4 have been complied with. If, however, there is no acceptance within the meaning of sect. 35, there may still be acts amounting to acceptance within the meaning of subsect. (3) which will render a verbal contract enforceable. For these reasons, in our judgment, the registrar came to a right conclusion. In those circumstances, it is unnecessary to express any opinion on the other points which were argued before us. The appeal will be dismissed.

Appeal dismissed with costs. Leave to appeal.

Solicitors: *Yarde & Loader* (for the appellant); *Hyde, Mahon & Pascall* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

VERNON v. FINDLAY.

[KING'S BENCH DIVISION (Lewis, J.), **October 31, November 1, 2, 1938.**]

Master and Servant—Verbal contract of employment for indefinite period at fixed yearly salary—Sales manager for company to be formed—Company never formed—Dismissal after three months—Contract not to be performed within a year—General hiring for a year—Custom as to notice in case of sales manager—Statute of Frauds, 1677 (c. 3), s. 4.

On Dec. 1, 1936, the defendants entered into a verbal contract with the plaintiff to employ him as sales manager as from Jan. 1, 1937, for a company to be formed, at a salary of £350 per year and commission. The company was in fact never formed, but the plaintiff worked for the defendants for nearly three months, and, upon his employment then being terminated, brought an action claiming three months' salary, together with one month's salary in lieu of notice. He claimed that a sales manager was entitled by custom to one month's notice. The defendants contended that the agreement alleged by the plaintiff was one not to be performed within a year, and pleaded the Statute of Frauds:—

HELD: (i) the contract, being for an indefinite period at a salary of £350 per year, was presumed to be a general hiring for a year, and could not, therefore, except by express stipulation or by custom, be terminated by either party before the end of the year.

(ii) there was no custom in the case of a sales manager that such a contract could be terminated by a month's notice before the end of the year.

(iii) the contract, being a general hiring for a year, and having been entered into before the commencement of the year, was one not to be performed within a year, and it being therefore within the Statute of Frauds, s. 4, no action could be brought thereon.

[EDITORIAL NOTE.] One of the most difficult problems in connection with service contracts is to decide the appropriate length of the notice to terminate such a contract in any particular case. The present case, though touching upon

this point, is in this respect of a negative, rather than a positive, value. It does, however, discuss another equally difficult problem, and that is when a contract of service is required to be in writing by reason of the fact that it is an agreement not to be performed within a year. It has been said that a contract of service for an indefinite period, determinable by reasonable notice, is not within the Statute of Frauds. The difficulty here was that there was no provision for notice, and the attempt to prove a custom failed.

AS TO AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR, see HALSBURY, Hailsham Edn., Vol. 7, p. 110, para. 156; and FOR CASES, see DIGEST, Vol. 12, pp. 123-125, Nos. 806-828.]

Cases referred to:

- (1) *Hanau v. Ehrlich*, [1911] 2 K.B. 1056; 30 Digest 194, 618; 81 L.J.K.B. 162; 105 L.T. 320; *on appeal*, [1912] A.C. 39.
- (2) *De Stempel v. Dunkels*, [1938] 1 All E.R. 238; Digest Supp.; 158 L.T. 85.
- (3) *Fairman v. Oakford* (1860), 5 H. & N. 635; 34 Digest 57, 327; 29 L.J.Ex. 459.
- (4) *Buckingham v. Surrey & Hants Canal Co.* (1882), 46 L.T. 885; 34 Digest 64, 392.
- (5) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654.
- (6) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 12 Digest 610, 5042; 60 L.J.Q.B. 734; 65 L.T. 286.
- (7) *Creen v. Wright* (1876), 1 C.P.D. 591; 34 Digest 64, 396; 35 L.T. 339.
- (8) *Fawcett v. Cash* (1834), 5 B. & Ad. 904; 34 Digest 56, 312; 3 L.J.K.B. 113.
- (9) *Lilley v. Elwin* (1848), 11 Q.B. 742; 34 Digest 108, 813; 17 L.J.Q.B. 132; 11 L.T.O.S. 151.

ACTION for damages for breach of a verbal contract of employment of the plaintiff as sales manager of a company to be formed. The plaintiff, in the alternative, claimed damages for misrepresentation.

B. L. A. O'Malley for the plaintiff.

Wilfrid Bennett for the first defendant.

C. Gallop for the second defendant.

LEWIS, J.: In this case, a Mr. Vernon is bringing an action against the defendants, Mr. Findlay and Mr. Vaughan, and the writ is indorsed for damages for breach of contract or for misrepresentation. The story he sets out is that there was a verbal agreement made on Dec. 1, 1936, that he should be employed from Jan. 1, 1937, as sales manager to a company, if and when it was formed, at a salary of £350 per annum, together with commission and expenses. I have heard Mr. Vernon in the witness-box, and, although on instructions he was somewhat severely cross-examined—I am not suggesting improperly at all, but rather with a view, as I thought, to showing that Mr. Vernon's story was not true—I only want to say that, as far as I am concerned, and without having heard, of course, any evidence for the defendants—a qualification which, of course, has to be made—I am satisfied that Mr. Vernon is telling me substantially the truth. Mr. Findlay's counsel, Mr. Bennett, has in his defence pleaded the Statute of Frauds, and Mr. Gallop, who appears for Mr. Vaughan, has not pleaded that defence, but has asked me to give

him leave to amend in order that he may plead it. Counsel for both defendants at the close of the plaintiff's case have taken the point that no action will lie because of the Statute of Frauds. That is a matter which has been argued before me, and, as I have come to a definite conclusion with regard to that point, it seems to me unnecessary to spend
A any further time upon this case by hearing the evidence for the defendants, both of whom, through their counsel, have intimated that they are quite prepared to give evidence.

The position, put shortly, is this. On Dec. 1, as I have said, the defendants engaged the plaintiff as a sales manager for a company to
B be formed. The company was to be formed to market certain typewriters. The plaintiff was to start his employment on Jan. 1, and, on the day upon which the contract was made—namely, Dec. 1—he gave a month's notice to his then employers to terminate his engagement with them. No company was ever formed. The plaintiff was to receive
C £350 per annum, with expenses and commission. The commission was given on the net sales, and, although the amount of commission was not mentioned, it was to be the usual commission. The plaintiff says that the usual commission is 5 per cent. Certain figures were put in—
D figures prepared by the plaintiff in the course of negotiations and in the course of discussions about the formation of the new company—which do not seem quite to bear out that the commission which was to be payable was as much as 5 per cent., and that is one of the matters upon which Mr. Vernon was somewhat severely cross-examined. As I say, the figures do not tally, but I wish to say at once that, simply
E because the figures do not tally, I am not at all of the view that Mr. Vernon was trying to tell me anything which he did not believe to be perfectly true.

The plaintiff did certain work for the defendants for rather less than three months, and he claims in this action three months' salary at the
F rate of £350 per annum, together with one month's salary in lieu of notice. He also claims that a sales manager is by custom entitled to one month's notice.

Upon the evidence which I have heard, together with the contract, whatever it was, upon which he says he is entitled to recover in this
G action, I am satisfied that the only express terms of the contract were those which I have set out above. Mr. Bennett, counsel for Mr. Findlay, having taken the point which appears in para. 6 of the defence, and which is, stated shortly, that sect. 4 of the Statute of Frauds has not been complied with, argues that the agreement alleged by the plaintiff is an
H agreement not to be performed within the year, and, therefore, an agreement which cannot be sued upon, in that there is no memorandum in writing signed by his client.

Some 250 years have passed since the statute in question was placed on the statute book, and there have been innumerable decisions on the words of that section. In one of those cases, *Hanau v. Ehrlich* (1), a

case which found its way to the House of Lords, there is pointed out the different classes of case which have been decided under the words of that section of the Statute of Frauds. LORD ALVERSTONE said, at p. 42 :

The one class of cases decides that if there is no mention of time, and the time is uncertain, the agreement is not within the statute. The other class of cases decides that if the time mentioned is more than one year, but there is power to determine, the agreement is within the statute. A

This analysis does not expressly or in terms cover the present case in one sense : the time in this contract is uncertain. No time is mentioned in that case which was then for consideration in their Lordships' House. The agreement was for two years' service, but subject to six months' notice. It was held, affirming A. T. LAWRENCE, J., as he then was, and the Court of Appeal, that this was an agreement within the statute. B

If, therefore, there exists a contract which is not to be performed within a year from the making thereof, by reason of a specified time being mentioned, that contract does not become a contract which is not within the statute merely by reason of the fact that there is provision in the contract which, being acted upon, would result in the contract being dealt with within the year—that is to say, such a provision as a six-months' or a three-months' notice. It is said that in the present case this contract was one which was not to be performed within the year from the making thereof. The contract was made on Dec. 1, 1936, to start on Jan. 1, 1937, and, if there was a contract for a year from Jan. 1, 1937, it is quite clearly not contracted to be performed within a year from the making thereof. The question which I have to decide is whether this is a contract for a year. It is not a contract for domestic services. Such contracts stand, perhaps, on a somewhat different footing. It is a contract of service at £350 per annum. C

In argument, I was referred to a case which was heard in the Court of Appeal in 1937, the case of *De Stempel v. Dunkels* (2), and great reliance was placed upon that case by Mr. O'Malley, who appears for the plaintiff, in order to show, as I understood it, that a contract such as this was not a contract within the statute. I listened to the argument, and I followed the case when it was being cited to me in court, and I have had an opportunity since then of looking at the report, where I have read the passages in the judgments of GREER, SLESSER and SCOTT, L.JJ., the three Lords Justices who decided that case. I need hardly say that I loyally adhere to what they have stated, but I cannot help thinking that there is a slight misapprehension with regard to the matter with which they were dealing in that case. As I understand the point in that case, which, indeed, is clearly set out, in my view, in the judgment of GREER, L.J., it was that it was being contended that, if you have engaged a person for a year and they allow that contract to run on for year after year, it is impossible to say that each year there is a contract for a year, which terminates automatically at the end of the year. I say that by way of introduction, and I will read the passages which were relied D

upon in argument. That, in my view, being the point which was being discussed in *Dunkels'* case (2), it seems to me to be a point very different from that which I have to decide in this case—namely, whether or not a contract for a period, which is a contract for an undetermined period, is a contract for a year. In the present case, if the contract was a contract
A for a year, as I have already said, it is quite clear that it was not to be performed within the year from the date of the making thereof, which was Dec. 1.

The first passage to which my attention has been drawn is where
GREER, L.J., says, at pp. 246, 247 :

B The other question is more involved and more difficult, having regard to the way in which the matter was pleaded. It was contended by Sir Patrick Hastings that, inasmuch as the plaintiff's first engagement was for a year certain, a continuation of his employment in each subsequent year was either, by implication, an agreement for a year only, or, if not, at any rate, an agreement for an indefinite period, which by law is necessarily an agreement for one year only. At one time, he contended
C strenuously that the defendant did not intend to induce Otto Dunkels to determine the plaintiff's agreement other than in a lawful manner, but, as I understood his argument, he abandoned this contention, and admitted that he could not suggest that the defendant was merely trying to get Otto Dunkels lawfully to put an end to the plaintiff's employment. In my judgment, it would be wrong to hold that each year there was, by implication, a fresh agreement for one year certain, and nothing more. It must be remembered that his first employment was a temporary one, for one year only, inasmuch as it was not certain that the Home Office would do what they afterwards did—namely, give him liberty to stay indefinitely in this
D country. I also think that it is no longer the rule applicable to all cases that an indefinite hiring is a hiring for a year only. In my judgment, POLLOCK, C.B., was right when he said in *Fairman v. Oakford* (3) that there is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances. One of the circumstances which determines matters of this sort may be a custom proved with regard to the particular employment, but there may be other circumstances pointing in the same direction. In *Buckingham v. Surrey & Hants Canal Co.* (4), the plaintiff was an engineer. He was employed
E as an engineer by the defendants at a salary of £500 a year, and was dismissed at 3 months' notice. If his hiring was necessarily a hiring for a year, he was entitled to remain until the end of the year, and could not be discharged by notice within the year. It was decided that the plaintiff could not be discharged by the 3 months' notice. In giving that decision, GROVE, J., said this, at p. 886 : "As a general rule, where the hiring is a yearly hiring, it cannot be put an end to by either party before
F the end of the year. This rule, however, is subject to an exception in cases in which the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice. Now, at the conclusion of the plaintiff's case, no evidence was offered on behalf of the defendants of any custom to determine such a hiring as this by a 3 months' notice. It seems to me, therefore, that the judge was bound to direct the jury that in the absence of any such evidence the hiring was a hiring for a year. There is nothing
G to show that the plaintiff accepted the engagement upon any other terms than those expressed in the resolution. The plaintiff established a *prima facie* case of a yearly hiring, and therefore, in the absence of any evidence of custom to rebut that *prima facie* case, I think the verdict ought to stand." Assuming, in the present case, that the hiring was a yearly hiring, it could not be determined before the end of the year unless it were proved that there was some custom, or some term in the contract, or some circumstance, which justified the inference that something other than a hiring for a year certain was intended. The plaintiff in this case was not
H given a sufficient notice, if he was entitled to any notice at all, but, inasmuch as the year expired, and he has not been employed since, it is contended that he is not entitled to complain. The rule with regard to an indefinite hiring, being, in the absence of a special agreement to the contrary, a hiring for a year, arose out of the hiring of agricultural labourers, which usually took place at a particular time in each year. Undoubtedly, in the last case referred to, it was applied to the engagement of an engineer at £500 a year. I think that it ought not to have been so applied, as it is unreasonable to suppose that either the employer or the engineer contemplated, when they entered into their agreement, that the agreement should be

determined other than by reasonable notice. Applying the rule as to implied contracts stated by BOWEN, L.J., in *The Moorcock* (5) and that stated by LORD ESHER, M.R. in *Hamlyn & Co. v. Wood & Co.* (6), I think that there must be implied in the contract between the plaintiff and Otto Dunkels in the present case a term to the effect that the plaintiff's employment should be determined only by a reasonable notice, and that, accordingly, the defendant, who, by his constant and repeated efforts, which up to a point were unsuccessful, in the end induced Otto Dunkels to regard the position as so unsatisfactory that he was ready to get rid of the plaintiff at any price, and did so without sufficient notice. A

In the same case, SLESSER, L.J., said, at pp. 251, 252 :

To establish the plaintiff's right to receive such damages it is first necessary closely to examine the agreement the breach of which the defendant is said wrongfully to have induced and procured. Particulars of the contract were finally given during the course of the trial, and were as follows : " The contract of employment was originally in writing and was made by an agreement dated Jan. 2, 1928. The same was of a temporary nature as appears from the terms thereof. In the month of Jan., 1929, it was orally agreed between the plaintiff and the said Otto Dunkels that the said employment should continue indefinitely and that the plaintiff's remuneration should be increased to 15 per centum of the annual net profits of the said business. In or about the month of Jan., 1933, it was orally agreed between the plaintiff and the said Otto Dunkels that the plaintiff's remuneration should be increased to 20 per centum of the annual net profits of the said business." The agreement, thus stated to be an oral one, was to continue indefinitely, and if, as Sir Patrick Hastings contends, it is an agreement for a yearly hiring, to expire at the termination of each year, in so far as Mr. Otto Dunkels did not purport to dismiss the plaintiff during, but continued the employment until the end of, the year 1935, there was no breach. B C

Although much argument was devoted to the elucidation of the legal constituents of a yearly hiring, there is no doubt in my mind that the law is correctly summarised in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, p. 144, as follows : " If a contract of hiring and service is a general hiring, that is to say, without limitation of time, there is a presumption that the hiring is for a year. . . . This presumption exists not only when the original contract was a general hiring, but also when, at the expiration of a contract for a definite period of service, the service is continued under a second contract which is indefinite as to time." On the other hand, as has frequently been said, the presumption of a yearly hiring is capable of rebuttal. It is not an inflexible rule, and the nature of the contract must be considered in connection with the circumstances of each case : per POLLOCK, C.B., in *Fairman v. Oakford* (3), approved by LORD COLERIDGE, C.J., in *Green v. Wright* (7), at p. 594. D E

The matter is dealt with by SCOTT, L.J., at p. 261:

Sir Patrick Hastings' reason for contending that there was no breach was that, in his submission, the plaintiff had never had anything but a yearly contract, a contract for each calendar year, which, according to its terms, would expire at the end of the year, and would not thereafter continue unless expressly renewed, and, further, that the plaintiff was in fact not dismissed, but was allowed to work out his current term to Dec. 31, 1935, and was accordingly paid down to that date. He supported this legal contention as to the duration of the contract by citing numerous cases on yearly hirings. I do not regard them as relevant, and am content to record my agreement with what GREER, L.J., has said about them. In the present case, there was, in my opinion, ample material in the evidence given, and particularly in the admissions of Otto Dunkels, to show that the oral agreement made in Jan., 1929, was not a yearly hiring at all, but a long-term contract of indefinite duration, extending beyond the then current year, and not terminable by reference to any particular annual or other date. Indeed, I think that there was some evidence upon which it was open to the jury to reach the conclusion that the agreement was for an employment to last as long as Otto Dunkels' business lasted, almost like a partnership, although, as the oral bargain did not contain any express term to the above effect, the mutual right to terminate the relationship upon reasonable notice would necessarily be implied. F G H

He then said that he agreed with his colleagues.

In the present case, it seems to me that, following the decision in that case, and following those in the earlier cases, this being a contract for

an indefinite period at a salary of £350 per annum, if the matter stopped there, I think that the position is, on the authorities, that that contract was a contract which was presumed to be a general hiring of the plaintiff's services for one year. In my opinion, that is now borne out by *Fawcett v. Cash* (8) and *Lilley v. Elwin* (9). Such a contract, in my opinion, cannot be terminated by either party before the conclusion at the end of the year. As GROVE, J., stated, in the passage which was quoted by SLESSER, L.J., in *Dunkels'* case (2), and indeed as appears in HALSBURY'S LAWS OF ENGLAND in the passage quoted by SLESSER, L.J., there is an exception to the rule, and, if there is an express stipulation or a custom, the contract can be terminated before the end of the year. I am not satisfied that in this present case there is any such custom as that suggested by the plaintiff. I do not think that his evidence amounts to sufficient proof of any such custom—namely, that this contract could be terminated by a month's notice before the year was out. Without suggesting for one moment that he told me what he did not believe to be true, I think that his evidence, even if accepted, is not sufficient to establish the custom that in this particular business a sales manager for a firm which is dealing, not with the retailer, but with sales to the trade, earning, on the figures he himself prepared, something in the neighbourhood of over £1,100 per annum, should be liable to a month's notice. It is perfectly true that he gave a month's notice to his previous employer, but he tells me that that was a very different position. There he was merely dealing with retailers, and his total remuneration for that was about £300 per annum.

In these circumstances, I feel bound to say that this is a contract upon which no action can be brought. I say it with regret, because I think that undoubtedly Mr. Vernon did work for these defendants, and I can only say, without knowing anything more about the case than I do—as I say, I have not heard the defendants' case—that I think it is a little unfortunate that Mr. Vernon was not given something for his services. I am bound to administer the law as I believe it to be, and, in the circumstances, I can only say that this claim as against Mr. Findlay fails, and that there must be judgment for Mr. Findlay with costs.

With regard to Mr. Vaughan, as I have already said, his counsel did not plead the statute, and has asked me to give him leave to amend by adding the plea. I propose to give him that leave. However, Mr. Vaughan, in his pleading, has also put forward a counterclaim by which he claims £25, which was lent to the plaintiff. Perhaps it is a little ungracious, when a man has done work for you—and on Mr. Vernon's story, which I accept, money was advanced in order to pay expenses to carry out work which was, by arrangement, to be paid back by the company when it was formed—to claim that £25 back, and I suggested to Mr. Gallop that he should be allowed to amend on the terms that he withdrew his counterclaim, and he acceded. I think that the proper order, in view of the fact of this last-minute amendment, so far as Mr.

Vaughan is concerned, is that there be judgment for the defendant Vaughan without costs, and, of course, the counterclaim withdrawn.

Judgment for the first defendant with costs.

Judgment for the second defendant without costs. Counterclaim withdrawn.

Solicitors: *Scott Duckers & Co.* (for the plaintiff); *Gamlen, Bowerman & Forward* (for the first defendant); *Forsythe, Kerman & Phillips* (for the second defendant). A

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

SCHEFF v. COLUMBIA PICTURES CORPORATION, LTD. B

[COURT OF APPEAL (Slesser and MacKinnon, L.JJ.), November 4, 1938.]

Practice and Procedure—Taxation—Action for infringement of copyright—Writ issued but no statement of claim delivered—Action dismissed for want of prosecution—Costs of preparing defence—Whether such costs properly recoverable on taxation—R.S.C., Ord. 65, r. 27 (9), (29). C

The plaintiff complained that the defendants had infringed the copyright in a book he had written. Correspondence took place between the parties from Oct. 12, 1937, up to Nov. 8, 1937, on which date the defendants gave an undertaking to keep accounts, on the understanding that the plaintiff would not ask for an injunction. On Jan. 22, 1938, a writ was issued claiming damages for infringement of copyright. No statement of claim was ever delivered, and on Apr. 8, 1938, the action was dismissed with costs for want of prosecution, no statement of claim having been delivered within 3 months of the issue of the writ. In the meantime, the defendants had been put to considerable expense in the preparation of their defence, and before the taxing master they claimed £420 in this respect. The master, who was apparently influenced by the fact that no statement of claim had been delivered, reduced this item to £26 5s. On appeal, the judge remitted the matter to the taxing master, directing him to allow the expenses incurred up to Nov. 8, 1937. Both parties appealed:— D

HELD: this accusation of breach of copyright necessitated the making of very close and careful inquiries. These would be no less necessary in fighting the action for damages than in opposing proceedings for an injunction. The costs had, therefore, been properly incurred, and were recoverable; and the appeal must be allowed, as the taxing master must have proceeded on a wrong principle. E F

Pecheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co. (1) followed.

[EDITORIAL NOTE. It often happens that parties are put to considerable expense in the early stages of litigation. It was here contended that, upon taxation, such expenses could only be recovered to a very small extent by the defendants where no statement of claim had been delivered. The Court of Appeal, however, have held that the mere non-delivery of a statement of claim—that is to say, the mere fact that the action was discontinued before the statement of claim was delivered—did not necessarily limit the rights of the defendants upon taxation, and that all costs properly incurred in the preparation of the defence ought to be allowed. G H

AS TO TAXATION OF COSTS ON DISCONTINUANCE, see HALSBURY, Hailsham Edn., Vol. 26, p. 102, para. 192; and FOR CASES, see DIGEST, Practice, pp. 500, 501, Nos. 1747-1753. See also YEARLY SUPREME COURT PRACTICE, 1939, p. 1475.]

Cases referred to :

- (1) *Pecheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.*, [1928] 1 K.B. 750; Digest Supp.; 97 L.J.K.B. 445; 138 L.T. 532.
- (2) *Harrison v. Leutner (Leutnor)* (1881), 16 Ch.D. 559; Digest, Practice, 500, 1747; 50 L.J.Ch. 264; 44 L.T. 331.
- (3) *Evans v. Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.: 106 L.J.K.B. 568; 157 L.T. 311.
- (4) *The Channel Queen*, [1928] P. 157; Digest Supp.; 97 L.J.P. 97; 139 L.T. 336.
- (5) *Windham v. Bainton* (1888), 21 Q.B.D. 199; Digest, Practice, 500, 1749; 57 L.J.Q.B. 519.
- (6) *Turnbull v. Janson* (1878), 3 C.P.D. 264; Digest, Practice, 928, 4696; 47 L.J.Q.B. 384.

APPEAL AND CROSS-APPEAL from an order of OLIVER, J., dated Oct. 21, 1938. The facts of the case are fully set out in the judgment of SLESSER, L.J.

F. W. Beney for the appellants.

J. P. Valetta for the respondent.

Beney: The taxing master has applied a wrong criterion in cutting down the charge for work done by the defendants' solicitors. It is only reasonable to prepare before a statement of claim is delivered. Clients are entitled to be protected against the attack when it is launched. The master has not said that these charges are excessive, but only that they are premature. There was sent to the defendants a synopsis of passages in both books and in the film, and much research work was done to find the sources of both. If the plaintiff had won the action, he would have been entitled to his costs incurred before the writ was issued: *Harrison v. Leutner* (2). The words used in that case were "reasonably and properly done." The master here said "reasonably and necessarily done." The Court of Appeal has power to review the position: *Evans v. Bartlam* (3). Costs which are incurred before the issue of a writ can be allowed: *Pecheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.* (1). [Counsel referred to *The Channel Queen* (4) and *Windham v. Bainton* (5).]

Valetta: The master exercised his discretion properly, and on the right principle. He considered the authorities, paid due attention to them, and allowed a reasonable sum. The costs of instructions to defend are purely in the master's discretion: *Turnbull v. Janson* (6). [Counsel referred to *Windham v. Bainton* (5).]

SLESSER, L.J.: This is an appeal from a decision of OLIVER, J., in which he varied the order of the taxing master in relation to certain costs in the action of *Scheff v. Columbia Pictures Corporation, Ltd.* Mr. Scheff, who appears to be an author, has written a book in German, called *Im Tal des Schweigens*, the English translation of which is *In the Valley of Silences*, or words to that effect. It appears that a Mr. James Hilton has written a book which, according to Mr. Scheff, is based upon matters which have already appeared in Mr. Scheff's book. The defendants

produced a film, based upon Mr. James Hilton's book, called *Lost Horizon*. On Oct. 12, 1937, Mr. Samuel Sebba, the solicitor for Mr. Scheff, writes that he is instructed by the agency acting for Mr. Scheff to complain, and he says :

I have now been instructed by my clients to institute proceedings against yourselves amongst others, for infringement of copyright in the book *Im Tal des Schweigens*. A

Then he states that the film is in effect based upon that book. He continues :

My instructions are to commence proceedings against Mr. J. Hilton, yourselves, Odhams Press, Macmillans, and the British Broadcasting Corporation, for infringement of my client's copyright as aforesaid, with a view to obtaining an injunction preventing further breaches of my client's copyright, and to claim damages for infringements committed in the past. B

He then had prepared an analysis of the principal instances in Mr. Scheff's book, Mr. Hilton's book and the Columbia film. There is a large number of such instances. Altogether there are mentioned some 20 instances of similarities between Mr. Scheff's book and Mr. Hilton's and the Columbia film. C

It is not necessary for the purposes of this case to consider the nature of the plot on which these various books and the film are based, but in substance it appears that, by one means or another, a gentleman called the hero finds himself in a remote area, and, being there, is entertained by persons who seem to hold very idealistic philosophic views. There is also, I see, a love interest. D

That being the case, the correspondence continued between the parties, and finally Mr. Samuel Sebba said that he was instructed to call for a satisfactory reply within 21 days. The matter proceeded, and it is not necessary, I think, to deal with the details of it. On Nov. 5, 1937, Mr. Sebba wrote : E

In the circumstances as my clients have not taken any steps to obtain an injunction restraining the further exhibition of the film [which by this time was being shown to the public] pending the trial of the action which would dispose of the issues as to copyright, my clients are advised that they are in any case entitled in the meantime without prejudice to their other rights, to ask for an undertaking that proper accounts will be kept. F

In replying to that, Messrs. Wright & Webb, acting for the Columbia Picture Corporation, Ltd., on Nov. 8 say : G

You may accept this letter as an undertaking on their behalf to keep proper accounts in respect of the exhibition and distribution or other publication of the said film.

Then they say on Nov. 11 that they are happy to accept service of process. H

On Jan. 22, 1938, the writ was issued by Mr. Samuel Sebba against the defendant company, claiming damages for infringement of the plaintiff's copyright. That action never got any further than that. There was a notice given by the plaintiff that he would not go on with the action, and no pleadings were ever delivered. That is common ground.

On that, there arose the natural consequences of litigation—namely, the question of costs—and certain claims for costs were put in on behalf of the defendants by their solicitors, and they amounted, so far as the matters which we have to consider here are concerned, to something in the nature of £420. The exact figure is not material. On the grounds
A of objections being put in, certain matters were emphasised to justify those costs in these words :

In these circumstances the defendant company's solicitors took what in their view was the proper course and ascertained the evidence which would be given by Mr. James Hilton . . . perused the plaintiff's book, which was in German and perused Mr. James Hilton's book comparing one with the other and thereupon commenced
B their research into a large number of works from which they obtained most important material confirming that the plaintiff's work and indeed Mr. James Hilton's work and the said film were based on common sources and the common stock of human knowledge and experience, e.g., works of fiction and imagination and travellers', historians' and botanists', etc., books on Tibet, its history, legends, lore, physical characteristics and resources. . . .

All of this would have been, in their view, a sufficient answer to the claim
C on the part of Mr. Scheff. Then they go on to say that it took a qualified clerk a really long time to do it, and they seek, generally, to justify their claim. They cite R.S.C., Ord. 65, r. 27 (9), which says :

. . . as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses
D are to be allowed.

On that, the taxing master made an order, in which he ordered that the costs should be taxed at the sum of £46 7s. 3d., after deducting £1 5s., in which is included the sum of £12 5s. found due to the defendants in his interim certificate.

In the answers to the objections, the master gives reasons which, in the opinion of the defendants' solicitors, afforded a ground for saying that he had not exercised his discretion on such proper principles as would allow the matter to be accepted by them, and they appealed to the judge. The judge allowed the appeal in part, and, on Oct. 21, 1938,
E ordered that the defendants' bill of costs herein be referred back to Master HOOPER for retaxation, with the direction that all costs properly incurred up to Nov. 8, 1937—after which date it became apparent that no injunction proceedings were contemplated—were reasonably incurred by the defendants.
F

The appeal is in regard to that limitation on a reference back only up to Nov. 8, 1937, and Mr. Beney, for the appellant here, asks that there should be a general reference back, and contends that the judge was wrong in limiting the modification of the master's order to that date. On the other hand, by cross-appeal, Mr. Valetta says that the judge was
G wrong, that the matter was entirely within the discretion of the taxing master, and that his discretion was properly exercised, and that, therefore, the taxing master's order for the lesser sum should be restored.
H

I entirely agree with everything which Mr. Valetta has said regarding the discretion of the taxing master, with which, so far as I understand it, Mr. Beney entirely associates himself. Primarily, the taxing and allow-

ance of costs are matters within the discretion of the taxing master, as provided in R.S.C., Ord. 65, r. 27 (29) :

On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party. . .

No costs, however, shall be allowed which appear to the taxing master to have been increased by over-caution, negligence or mistake. I must assume, I think, on this claim for the large sum, that the taxing master must have come to the conclusion that much of the amount he has disallowed was improperly increased through over-caution, and that it was claimed improperly: A

If that be the right conclusion, the question, I think, not being one merely of quantum, but of the application of that rule that I have mentioned and of subrule (9)—that only such just and reasonable charges as are properly incurred are to be allowed—one must look very critically at the reasons of the master, to see if it be right to hold, as Mr. Valetta invites us to hold, that he was exercising his discretion, and exercising it on an unimpeachable principle. The first thing that appears in the reasons given is that the taxing master has thought fit, as I read it, to make a material statement in coming to his conclusion—namely, the fact that no statement of claim was ever delivered. He starts his reasons thus : B

The case presented a somewhat unusual feature inasmuch as no statement of claim was ever delivered and in consequence thereof the action was dismissed for want of prosecution within three months of the issue of the writ. C

Then he sets out the correspondence and states the facts which I have already mentioned. Then he says : D

As already stated, no statement of claim was ever delivered and the only particulars of the alleged infringements were those contained in a certain letter. E

I find it impossible to accede to Mr. Valetta's argument that those matters so stated in the master's reasons did not materially influence the result at which he arrived, and I must assume that the judge, in remitting the matter to the taxing master with the limitation of time, must have taken that view also. Otherwise there would have been no reason for disturbing the discretion of the master. F

Numerous authorities were cited here, but I think that it is necessary for this purpose to look at only one—namely, *Pecheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.* (1). In that case, this court, having stated that it is for the taxing master to determine, having regard to the stay and other material matters, whether the costs were reasonably or properly incurred, say, as I read it, that all costs incurred before action brought can be costs proper to be allowed. LORD HANWORTH, M.R., says, at p. 757 : G

It appears to me, therefore, that there is power in the master to allow costs incurred before action brought, and that if the costs are in respect of materials ultimately proving of use and service in the action, the master has a discretion to H

allow these costs, which he probably will exercise in favour of the party incurring them, because they have been made use of during the course of the action.

Later, ATKIN, L.J., says, at p. 761 :

Here the defendants' solicitors had written at an early stage intimating that the defendants intended to resist liability, and expressing their reason in language which certainly might give rise to a reasonable apprehension on the part of the plaintiffs' advisers that the plaintiffs were going to be charged with fraud.

A In the present case, I agree that the discretion is for the taxing master, although it is obvious, on the very serious accusation made in this case with regard to the breach of copyright, that that very accusation would itself necessitate the very close and careful inquiries which are set out,
B and I cannot entirely divorce from my mind the consideration as to how far the fact that there is no statement of claim has weighed with the taxing master in the very great discrepancy between the amount allowed on the particular matter and the amount claimed. That is only one element, but it indicates to me that the master was allowing his mind to
C be influenced by the facts that the action was discontinued and that no pleadings were actually delivered. In the *Pecheries Ostendaises* case (1), ATKIN, L.J., says, at p. 762 :

The other matter that arises is as to the costs incurred before the action was commenced. That has nothing to do with the stay of proceedings, but it is a pure question whether or not the costs incurred before the writ was issued are costs which
D the plaintiffs can recover under an order for the costs of the action.

I am not satisfied in the present case that the taxing master has isolated in his mind these questions and has considered what he has to consider—namely, whether these are costs properly recoverable under an order, irrespective of the question whether they are costs incurred before action
E brought, between action brought and the delivery of the pleadings, or after the pleadings have been delivered. I think, therefore, that the judge was right so far on that part of his order.

There only remains the question whether Mr. Beney is right in saying that the judge ought not to have limited his order to the costs incurred
F up to Nov. 8, 1937. If it be right that the taxing master should take into consideration what costs were reasonably necessary within the meaning of the order, as stated in one of these cases, I can see no justification for limiting that inquiry to Nov. 8, which the judge seems to indicate he does, because after that date it became apparent that no
G injunction proceedings were contemplated. The necessary expenses were no less caused by the material which had to be collected to fight the action for damages, as the material for proceedings for an injunction. I think that to that extent the judge was wrong in so limiting the order. In the result, the appeal succeeds, and the cross-appeal must be dismissed.

H

MACKINNON, L.J. : I agree. It is not for this court to interfere with the taxing master's discretion when it is a question of the amount that is allowed. The point is whether there is a principle involved.

In this case, a claim for costs was cut down materially, and in giving his decision the taxing master cut out certain amounts on the ground

that they were not reasonable or proper. I think that that is a necessary inference from the words that he used—having allowed what he considered a reasonable and proper sum, but not so great a sum, for some of the work which was necessary to be done. He therefore disallowed the other. He has also stated, and stated three times over, that he has taken into account the very unusual feature that no statement of claim was ever delivered. Then he says :

No step in the action other than the service of the writ has been taken by the plaintiff.

Then, in deciding the amount allowed, he says that the defendant company's solicitors now claim

For work done in rebutting and defeating the plaintiffs' alleged infringements and which alleged infringements have never yet been formally pleaded in the action.

The only inference to be drawn from that is that the master has gone on a wrong principle in holding that work done before the delivery of the statement of claim was improperly done. That being so, I think that he ought to have allowed those costs as reasonably incurred, quite apart from any question of whether the statement of claim had been delivered, and without being in any way affected by that fact. Therefore, he acted on quite a wrong principle, not merely on a question of amount. I think, therefore, that the matter ought to go back to him for him to apply the right principle, which is that the certificate must be given for the expenses necessary or proper for defending the rights of the parties, irrespective of the question of whether the labour was expended before the writ or before a statement of claim, or at any time with reference to the proceedings in the action.

Appeal allowed with costs. Cross-appeal dismissed with costs.

Solicitors : *H. S. Wright & Webb* (for the appellants); *Oscar Mason Co.* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY v. PICKARD.

[KING'S BENCH DIVISION (Atkinson, J.), **October 18, 19, 20, 21, 24, 25, 26, 31, November 1, 8, 1938.**]

Master and Servant—Liability for tort of servant—Fraud involving forgery—Ostensible authority.

A solicitor's managing clerk obtained an advance of a sum of £500 upon a mortgage of property by producing to the society's solicitors a fictitious deed. It was not proved that the solicitor's clerk actually forged the deed, but he must have known that it was a forged document. It was contended that the solicitor could not be made liable for the fraudulent acts of his clerk where the fraud involved forgery. It was held as a fact that the clerk had ostensible authority for all that he did in the matter :—

HELD : so long as the clerk was acting within his ostensible authority, the master was liable, despite the fact that the fraud involved forgery.

[EDITORIAL NOTE.] The argument for the defendant in this case is based upon a passage in the judgment of WRIGHT, J., as he then was, in *Slingsby's* case (6). The passage is in these terms: "An act of forgery is a nullity and outside any actual or ostensible authority, and outside the principle of *Lloyd v. Grace, Smith & Co.* (3)." As is pointed out in the judgment herein, this passage would not appear to have been assented to, at any rate to its full extent, by the Court of Appeal, and it is found possible to decide this case contrary to the precise meaning of that passage. It may also be pointed out that *Slingsby's* case (6) was one in which there was no ostensible authority, and therefore is distinguishable upon the facts from the present case.

AS TO PRINCIPAL'S LIABILITY FOR WRONGFUL ACT NOT EXPRESSLY AUTHORISED, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 285-287, para. 471; and FOR CASES, see DIGEST, Vol. 1, pp. 594-604, Nos. 2282-2340.]

Cases referred to :

- (1) *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 1 Digest 587, 2245; 36 L.J. Ex. 147; 16 L.T. 461.
- (2) *Swire v. Francis* (1877); 3 App. Cas. 106; 1 Digest 596, 2290; 47 L.J.P.C. 18; 37 L.T. 554.
- (3) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 1 Digest 595, 2284; 81 L.J.K.B. 1140; 107 L.T. 531.
- (4) *Ruben & Ladenburg v. Great Fingall Consolidated*, [1906] A.C. 439; 1 Digest 592, 2268; 75 L.J.K.B. 843; 95 L.T. 214.
- (5) *Kreditbank Cassel G.m.b.H. v. Schenkers*, [1927] 1 K.B. 826; Digest Supp.; 96 L.J.K.B. 501; 136 L.T. 716.
- (6) *Slingsby v. District Bank, Ltd.*, [1931] 2 K.B. 588; *affd.*, [1932] 1 K.B. 544; Digest Supp.; 101 L.J.K.B. 281; 146 L.T. 377.
- (7) *Mahony v. East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 9 Digest 642, 4239; 33 L.T. 383.

ACTION for damages for fraud.

The Uxbridge Permanent Benefit Building Society by the statement of claim claimed damages against the defendant for being induced by the fraud of the defendant's managing clerk to lend £500 on the security of a mortgage of a house known as 9, St. Bernard's Road. The fraud was denied, and in any case there was no suggestion that the defendant, Mr. J. H. Pickard, a solicitor, was in any way to blame in the matter. The defendant practised in London and had a branch office in Slough, where a man named Conway was employed as managing clerk. Conway had, a short time before the transaction here in question, been concerned in dealings with the property known as 9, St. Bernard's Road, and must certainly have been well acquainted with the title to the property. In 1936, according to the evidence of Conway, a man named Cox came to the office at Slough and stated that he wished to raise £500 upon a mortgage of the property, 9, St. Bernard's Road, which he had just bought. It was arranged that this mortgage should be offered to the plaintiff building society, and the usual application form was sent to them through Conway. The title deeds, which were subsequently shown to the society's solicitors, were such that Conway must have known them to be fictitious, although they would appear in order to anyone else. The mortgage was ultimately completed, and the mortgage money was paid through the defendant

solicitor to the man Cox. The mortgage, therefore, was obtained by the production of a forged document, and the defence was that the master could not be held responsible for the fraud of his servant which involved forgery.

B. B. Stenham and Frank Whitworth for the plaintiffs.

J. D. Cassels, K.C., C. A. Collingwood, and John Busse for the defendant. **A**

ATKINSON, J. [after considering the evidence]: I am irresistibly driven to the conclusion that Conway was a party to this fraud. I cannot bring myself to doubt it. It seems to me that the evidence and circumstances, when examined with care, are quite overwhelming. What is the result? Here is a man who is in sole charge of a branch office. He is authorised by the defendant on his behalf to carry out conveyancing business, and to borrow money from building societies for clients, secured by mortgages of real property. He was engaged in a transaction which, on the face of it, was an ordinary everyday transaction, well within his actual and ostensible authority, and which put £11 10s. into the defendant's pocket for costs. Can there be any doubt as to what the law is when you have a fact of that kind? In *Barwick v. English Joint Stock Bank* (1), the principle is stated by WILLES, J., at p. 266: **B**

In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in. **D**

There is a very clear statement of principle which was applied in a case which is not different, I think, from this, *Swire v. Francis* (2), a Privy Council case. There it was a case where a man in charge of a branch was authorised to make advances, loans, to clients and then to claim them from the main agent. It was in the course of his business to do it. It was his duty to do it. On one occasion, he made a fictitious claim, a claim that he had made a certain payment when he had not, and he got it paid to him by the principal agent. He was doing something which was within the class of business he was authorised to do, and, while doing that, he defrauded somebody, and the principal was held liable. **F**

Then comes the well-known case of *Lloyd v. Grace, Smith & Co.* (3). It is quite unnecessary to refer to that case in detail, but there are just two or three passages which are worth looking at. LORD MACNAGHTEN, in approving a statement of LORD BLACKBURN, said, at pp. 735, 736: **G**

"The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud. That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions "acting within his authority," "acting in the course of his employment," and the expression "acting within the scope of his agency" (which STORY uses) as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression **H**

is used it must be construed liberally, and probably, as SIR MONTAGUE SMITH observed, the explanation given by WILLES, J., is the best that can be given.

Later, there is a quotation from STORY ON AGENCY which I need not read, but which is very apt. It is only multiplying passages if I quote them. There is a very short summary in the opinion of LORD SHAW, at p. 740 :

A But when the authority does ostensibly include within its scope transactions of a particular character, then *quoad* a third party dealing in good faith with such an agent, the apparent authority is, as is well-settled, equivalent to the real authority and binds the principal.

I think that that puts the point really in a nutshell. Here there was something done which was within, if not the ostensible, at least the apparent, authority, and I cannot see on what ground this case can be said not to come within that principle. It is said, however, that this fraud involved forgery, and forgery can never be within a presumed or ostensible authority. Of course, the fraud did involve forgery. The fraud consisted really of a number of false misrepresentations, backed up by the production of a forged deed which, I was going to say, Conway wrote and forged. There is no evidence, however, that he forged it, though he must have known that it was a false document. The second deed for which he must accept responsibility is the conveyance to Cox. Here is a series of misrepresentations, certainly backed up by forgery. The argument was that, assuming the worst, this is not a case for which the principal can be held responsible, because the fraud involved forgery. There have been three cases relied upon for this contention : *Ruben & Ladenburg v. Great Fingall Consolidated* (4), *Kreditbank Cassel G.m.b.H. v. Schenkers* (5) and *Slingsby v. District Bank, Ltd.* (6). *Ruben's* case (4) really does not help the defendant at all. In *Ruben's* case (4), a secretary for the defendant company had forged a certain share certificate. He had forged the signatures of the directors, had put the seal on without any authority, and the question was whether the company were bound by the certificate. Of course they could not be. The whole thing was a nullity. It was nowhere said or suggested there that, if what had been done had been done within the apparent scope of the authority of the secretary of the company, the company might not have been liable. I take this from the opinion of LORD LOREBURN, L.C., at p. 443 :

G I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

H That is a particular assumption which a person dealing with a company is entitled to make, and it cannot cover a forgery. He continues, at p. 443 :

Another ground was pressed upon us, namely, that this certificate was delivered by Rowe in the course of his employment, and that delivery imported a representation or warranty that the certificate was genuine. He had not, nor was held out as having, authority to make any such representation or to give any such warranty.

And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the defendant company is estopped from disputing the genuineness of this certificate.

There is nothing there to support the suggestion that a principal may not be liable for a forgery if that forgery is committed in the course of a man's employment and within the scope of his ostensible authority. The court is pointing out that in that case there was no evidence of such holding out or such authority. Nor do I think that the defendants derive any support from the *Schenkers'* case (5). There a manager of a branch business in Manchester, having no authority to draw bills at all, did draw 7 bills in his employers' name. Ultimately, the drawers were sued on these bills, and the question was whether they were liable. It was held that the use of their signature by this manager was a forgery, and that the employers, the company, were not liable. No one suggested there that, if there had been any evidence of ostensible authority, or proof of ostensible authority, they would not have been liable. BANKES, L.J., deals with the point at p. 834 :

But during the argument a further point was made which also seems to me fatal to the plaintiffs' case, the point, namely, that the act of the branch manager was a forgery so that the bills of exchange were mere waste paper, and the plaintiffs can therefore make no claim against the defendants except upon one of two grounds, either that the defendants are estopped from setting up the forgery, or that, apart altogether from the rule in *Mahony v. East Holyford Mining Co.* (7) and the form of art. 18, the branch manager had such ostensible authority as to render his employers, the defendants, liable for his act in drawing and indorsing the bills.

There BANKES, L.J., was plainly saying that the only way in which one could base a claim against the defendants would be to base it upon the ground that there was an ostensible authority. In that case there was no such ostensible authority. BANKES, L.J., at p. 835, quoted from the opinion of LORD MACNAGHTEN in *Ruben's* case (4) :

"Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel."

Then he says, at p. 836 :

If they could have shown that the drawing and indorsing of bills of exchange was within the ostensible authority of a person occupying the position which this branch manager occupied, they might have been in a position to establish a claim founded upon that ground. No such evidence was given, and I certainly am not prepared to accept the proposition that it was within the ostensible authority of this branch manager, having regard to his position, to sign bills to this amount and in this form.

I do not know that SCRUTTON, L.J., deals much with this particular point, but ATKIN, L.J. (as he then was), deals with it at p. 843 :

The actual evidence in this case was that the company never signed bills at all, and in the absence of evidence that the person has ostensible authority to draw bills I should think that he plainly has not authority to do so. Therefore, we have the ordinary case of a person having purported to exercise an authority to bind the company in fraud of the company outside the scope of his ordinary ostensible authority. If that is so, then under the Bills of Exchange Act, 1882, s. 24, the holder is not entitled to enforce payment of these forged bills unless the principal is precluded from setting up the forgery or want of authority. To my mind, as this act was not done within the ostensible authority of the agent, the principal is not precluded from setting up the want of authority.

It seems to me that there you have two authorities of the plainest kind showing that forgery is just like any other fraud. If it is committed within the ostensible authority of an agent, the principal is liable. However, Mr. Cassels certainly found more help in *Slingsby's* case (6) in the court of first instance. That was a curious case. Some trustees had
A a solicitor named Cumberbirch. It became necessary to draw a cheque payable to some stockbrokers for the purpose of an investment, and he drew the cheque for them to sign. After they had signed it, Cumberbirch added, after the name of the payees, "per Cumberbirch & Potts"—his own firm. That was a very curious form of cheque, but, upon being
B handed in to his own bank, it was paid by the District Bank, the bankers for the trustees. The trustees sued the District Bank to recover this money. A great number of points were taken in the case, but one of the points which was argued for the plaintiffs was this one, similar to the point here, that here was a solicitor with apparent authority
C to handle cheques on behalf of the trustees, and that it was, or ought to be deemed to be, within the ostensible authority. That argument found no favour before WRIGHT, J., or in the Court of Appeal, but WRIGHT, J., said, at pp. 604, 605 (and this is the strongest passage Mr. Cassels has got) :

I think there is a further ground why in such a case as this the drawers cannot
D be held directly liable as principals for the fraud of their agent—namely, that the fraud was an act of forgery. This question was discussed in *Ruben & Ladenburg v. Great Fingall Consolidated* (4), and more recently, and since *Lloyd v. Grace, Smith & Co.* (3), in *Kreditbank Cassel G.m.b.H. v. Schenkers* (5). In both those cases the forgery was in the signatures to the documents and the question was whether the documents were binding on the respective companies, on the principle that outsiders were entitled to assume that matters of indoor management were in order.
E In principle this question is not dissimilar from what is involved in the question whether an act is within an agent's ostensible authority. It was held that the question could not be raised in the case of a forgery. Though a man may be estopped by conduct from denying that a forgery is his signature, yet as forgery is a crime he cannot authorise it in advance (if indeed it is not a contradiction in terms to authorise a forgery) without being an accessory before the fact. Nor can he agree to be bound by it subsequently, so as to shield a criminal or compound a felony. Hence an act of forgery is a nullity and outside any actual or ostensible authority, and outside
F the principle of *Lloyd v. Grace, Smith & Co.* (3).

One is bound to agree that that passage from the judgment of WRIGHT, J. (as he then was), is a difficult one, but I do not think for a moment that he meant that to be taken literally, because, after all, what he was saying purported to be founded on the two cases to which I have referred, and
G it is perfectly plain from those two cases that, although you have no right to presume authority where there is a case of forgery, you are entitled to presume ostensible authority. Let me take the simple case. Supposing Mr. Conway has authority to sign cheques relating to the business of Mr. Pickard, to use Mr. Pickard's name and sign, and yet on one occasion
H he signs a cheque for a certain payment which he has no business to make at all—a payment to himself, or something of that kind—and the bank pays it. Can it really be suggested for a moment that Mr. Pickard would have been entitled to say that this particular signature was a forgery? It is really impossible. Yet it would be a forgery. The answer would be :
" But you have given ostensible authority to Mr. Conway to sign cheques."

I cannot bring myself to think that WRIGHT, J., meant any more than that you could not assume authority to sign somebody's name. It is very difficult to criticise language used by so great a judge, but I am quite sure that he could not have meant that an act of forgery is always a nullity and always outside any actual or ostensible authority. If he did, I cannot assent to it, and certainly it received no support in the Court of Appeal, because there, in dealing with this point, SCRUTTON, L.J., never says a word to indicate that forgery is on any footing different from that of any other fraud in reference to this principle. He says, at pp. 560, 561 :

Lastly, it was said that the decision of the House of Lords in *Lloyd v. Grace, Smith & Co.* (3) protected the defendants. I understand that case to be a case of a servant or agent using ostensible authority to do a certain class of acts for his employer who acts for his own benefit, with no notice to the person injured of his wrongful action. In the present case, as far as the Westminster Bank was concerned, there was no ostensible authority and there was notice putting that bank on inquiry ; as far as the defendant bank was concerned, there was no ostensible authority. I have expressed my judgment in my own words having regard to the exhaustive arguments addressed to us. I might, however, have been content to adopt the careful judgment of WRIGHT, J., with which I substantially agree.

Having just said what he had said, it is perfectly clear that he did not read what WRIGHT, J., had said in the way in which I am asked to read it, because he had just pointed out that in that case there was no ostensible authority, whereas, if I am to take the view I am asked to suppose that WRIGHT, J., took, he would have said : " This point does not arise. This is forgery, and, therefore, it is no use considering whether *Lloyd v. Grace, Smith & Co.* (3) applies or not, because it is outside that principle." GREER, L.J., refers to this at pp. 563, 564.

The only point remaining to be considered is whether the defendants are entitled to succeed on the ground that though the plaintiffs did not authorise the addition made to the cheque by Cumberbitch, they are liable on the doctrine of holding out for the same reasons that a solicitor was held liable for the fraudulent acts of his clerk in *Lloyd v. Grace, Smith & Co.* (3), I think this defence fails also. It is not part of the usual business of solicitors to write their clients' cheques, still less to alter them after they have been written. Every time a solicitor draws a cheque for signature he gets a particular authority to do a particular act. He does not draw his employers' cheques because that is within the apparent authority of solicitors generally, and, indeed, the argument before us was not based on this ground, but on the ground that the writing of the words " per Cumberbitch & Potts " was in fact the writing of Cumberbitch, who had written the words as they were when the cheque was signed, and the fact that they were added after signature was not apparent. The point is not one about which much can be said, but it seems to me to be impossible to hold that if I authorise a man to write out a document for me, it is therefore within his apparent authority to add something which alters the effect of that document.

Thus, quite plainly GREER, L.J., was not saying that he considered the question of ostensible authority, because forgery was outside any such doctrine. Both SCRUTTON, L.J., and he considered the principle and held that it did not apply in that particular case. I was in the case as counsel, and I am quite sure that neither of the Lords Justices read what WRIGHT, J., had said in the way in which I am asked to read it to-day. I think that he can only have been referring to the act of forgery before him—that an act of that sort could not be presumed to be within the actual or ostensible authority of a solicitor, that there was in fact no

ostensible or apparent authority in that case, and that, therefore, the principle of *Lloyd v. Grace, Smith & Co.* (3) could not apply. If he did mean more than that, I am bound by the one decision of the House of Lords and the two decisions of the Court of Appeal, which quite clearly treat forgery just like any other fraud. If it comes within the ostensible or apparent authority, the principal is liable.

Though feeling considerable sympathy for Mr. Pickard, I am bound to give a judgment against him for the sum of £479 12s. 6d. Unless I am persuaded, I am not going to award any interest by way of damages. I cannot help thinking that Woodbridge & Son ought to, or might, have detected the weakness of that title. I do not think that it would be right in this case to give anything beyond the sum which has been lost. It is purely discretionary whether I give interest by way of damages. I do not know that there is any claim for it, but I do not think that it would be right to give more than the precise sum which has been lost in this case.

Judgment for £479 12s. 6d., with costs.

Solicitors : Woodbridge & Sons (for the plaintiffs) ; Pickard & Co. (for the defendant).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

Applied. PROTHEROE v. RAILWAY
EXECUTIVE. [1950] 2 All E.R. 1093.

GILLMORE v. LONDON COUNTY COUNCIL.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge),
November 7, 1938.]

Education—Classes in physical training—Small fee charged—Classes held where floor highly polished—Exercise in nature of game—Injury to member of class—Breach of warranty—Volenti non fit injuria.

The plaintiff had joined a class in physical training organised by the defendant council, and had paid a small fee upon joining. The exercises were performed in a hall which was used for dances and of which the floor was fairly highly polished. While performing an exercise in which the members of the class were hopping on one leg and making lunges at another member in an endeavour to compel that other to put his raised foot on the ground, the plaintiff slipped and suffered injury. The whole class at the time were wearing rubber shoes. It appeared in evidence that it had been discussed whether the floor should be covered with matting or a drugget :—

HELD : (i) the duty of the council was to provide a floor which was reasonably safe in the circumstances, and this they had failed to do.

(ii) the accident did not result from a risk which the plaintiff had agreed to take, and the defence of *volenti non fit injuria* was not available.

[EDITORIAL NOTE. It will be noted that, although these were exercises being performed in the course of instruction in physical training, the members of the class were in fact playing a game. Where one plays a game like football, one certainly takes the risk of certain injuries which may befall one without fault on the part of anyone. If an action were brought in respect of such injuries, the defence of *volenti non fit injuria* could be successfully pleaded. The circumstances of this case are distinguished from those in such a game, for it is said that the council, in allowing

these exercises to be performed upon a floor with a highly polished surface, have added a danger beyond the usual dangers attending the playing of such games.

AS TO ACCIDENTS DURING PHYSICAL TRAINING OR RECREATION, see HALSBURY, Hailsham Edn., Vol. 12, p. 41, para. 86; and FOR CASES, see DIGEST, Vol. 19, p. 557, Nos. 22, 23.]

Case referred to:

- (1) *Maclean v. Segar*, [1917] 2 K.B. 325; 36 Digest 123, 817; 86 L.J.K.B. 1113; 117 L.T. 376.

ACTION claiming damages for breach of warranty, and, alternatively, for negligence. The facts are fully set out in the judgment.

J. Bassett for the plaintiff.

R. T. Monier-Williams for the defendants.

DU PARCQ, L.J.: The plaintiff, having seen an advertisement of classes in physical training organised by the defendants, the London County Council, was interested, and eventually joined one of the classes. He paid a small fee for the privilege of admission, and attended for some time, no doubt with benefit to himself. When he first attended the classes, they were being held in the hall which during the summer months in a slightly altered form fulfils the purpose of the Paddington swimming bath. As commonly happens when the bathing season is over, such baths are floored over and used as halls. In the present case, when the bath was wanted again for its purpose as a swimming bath, the classes were transferred to the Porchester Hall, which is a very fine hall let out by the Paddington Borough Council. I do not think that there is any possibility, though it is not necessary for me to decide it, of any blame attaching to the Paddington Borough Council in this case. The exercises were Swedish exercises. Some of them were of a rather formal character, but some of them were less formal and regulated. Handball, for instance, was played. That meant that there was a good deal of running about. The material form of exercise in this case was one which was performed by the young men in pairs, each of them hopping on his right leg with his hands behind his back, endeavouring, by making lunges at the other, which the other sought to avoid, to compel the other to put his left foot down on to the ground.

On June 22, 1937, the plaintiff was engaged in that exercise with a Mr. Ryan as his partner, when, according to his own account of the matter, he went to put his foot down and slipped. He was hopping on his right leg, and he says that, when he put down his left leg—or rather, when he went to put down his left leg, as he puts it—he just sat on it, and he was definite that he slipped. He had never slipped before, and it had never occurred to him before that the floor was dangerous, even when he had run upon it. He was wearing, as I think certainly on this occasion all those participating in that exercise were wearing, rubber shoes. Mr. Ryan, who was his partner or opponent, whichever one chooses to call him, saw what happened, and he says that the plaintiff's foot slipped

because of the floor. That was his opinion. No doubt he is rather basing that on a conclusion he has formed, and not entirely upon observation, but nevertheless he bases it partly on observation. He says this :

A The plaintiff's foot slipped because of the floor, because he had successfully hopped away on two previous occasions without slipping.

B He says, however, that he does not think that it is right to say that the plaintiff simply lost his balance because of the way his foot shot away. He says that he had himself slipped once or twice, and he did know that the floor was slippery. He had never slipped when they were working in the Paddington Baths, where the floor has a different surface, as I shall show in a minute.

C Mr. Taylor, who was another who took part in this exercise, says that he has slipped in doing a similar exercise. He is a very sensible sort of man, I think. He may be more cautious than most people, but he is not the sort of man who would be unduly timid, so that it is noteworthy, perhaps, that after June 22 he did not go again to take part in these exercises until the classes went back to the Paddington Baths.

D The case for the plaintiff is that the floor surface at Porchester Hall is really not suitable for exercises of this kind. It is a polished surface, because the hall is very largely used for dances. It is used also for wedding receptions, and similar ceremonies and festivities. On those occasions, part, at any rate, of the floor is covered by carpets or rugs, and sometimes people dance. Then, sometimes the hall is used for public meetings, when it is usual to cover the whole of the floor, to

E protect the floor, with a drugget or covering of some sort. Naturally, I think that it would be absurd to put down a drugget or covering of that kind when exercises of this sort were going to be performed. I do not think that any complaint can be made that the floor was not covered in that way. However, the question is, I think, whether it is a reasonably safe floor to use when one is inviting people to come and make use of it for physical exercises of this kind. I am not sure that one can apply to a case of this kind the rule which has been pressed upon me associated with the case of *Maclean v. Segar* (1). I think that the proper way to put it is this. If any person or body of persons invite a

G man for reward to take part in physical training, and invite him to come for that purpose to premises which they have hired, or of which for the time being they are in possession, then, in those circumstances, that person or body of persons impliedly warrant that they have taken reasonable care to see that the premises are in all respects reasonably

H safe for the purpose. If I were trying the case with a jury, I think that that is the direction I would have given them as to the law, and I would have told them that, in considering what is reasonable, you must not ask for perfection, nor must you expect that the most perfect floor hitherto known to man has been laid down. I would have told them also that it is not conclusive in order to show that a floor is reasonably

safe to prove that it has been used a great deal without any injury coming to anybody.

I have had evidence, of course, on each side here, and, if I summarise the evidence for the defendants, I think it comes to this, that, though nobody would choose a polished floor, polished as this one was so as to be suitable for dancers, for the purpose of physical exercises, still, the real reason for that is not so much any possibility of danger as the fact that, of course, it would be gratuitous and a little absurd to polish a floor when the polish at any rate would do no good. It would never occur to anybody to say that a gymnasium ought to have a polished floor. It does not follow that, if it has a polished floor, it becomes a dangerous place.

I think that one ought first of all to consider why there is any objection, if objection there be, to a polished floor. I am bound to say that the witnesses for the defendant council were extremely frank, and gave me every assistance. One of them, a gentleman of great experience, says that the reason why polish on a floor of this kind is not satisfactory—at any rate, not ideally satisfactory—is that polish on hard wood accentuates the tendency to slipperiness which you find in hard wood. He says, and I have no doubt quite rightly, that you cannot get the perfect floor. If you have a soft-wood floor, then, there is a tendency, not only to collect dust, but also to form splinters, and they, of course, have their dangers. Hard wood, no doubt, is better, but hard wood has a tendency towards slipperiness which soft wood has not. I imagine, however, that everyone would say that hard wood was to be preferred. Nobody could say, however, that you ought to accentuate that unfortunate tendency to slipperiness by polishing that floor, and it would make matters no better if it were polished rather more in some places than in others, which may have been the case here, when I recollect the evidence which was given by Mr. Nunn, the attendant at Porchester Hall. There is also much evidence for the defendants by gentlemen who, I am sure, have been absolutely straightforward, who told me that they had tested this floor and found that really it was very difficult to slip when you were wearing rubber shoes. They say that whatever danger there may be said to be in a polished hard-wood floor is entirely counteracted if you wear rubber shoes. What it comes to is that they said: “I wore rubber shoes, and I tried to slide, and tried to slip, and really could not do it.” That appears valuable, though it may be that to a certain extent it must be discounted. I think that it is almost outside the powers of a human being who knows that a floor is under suspicion, and goes to test it himself, wearing rubber shoes, to see if he can slip on it, to make a perfectly fair test, however honest and however impartial he may be. The man who, be it only subconsciously, wants to say, “You can slip,” probably will slip, and a man who hopes to say that there you cannot slip probably will not slip. It is hardly likely, in any case, that anybody who goes on to a floor in that state of mind will slip, because, when you know that

there is some danger through slipping, all the muscles which counteract a tendency to slip automatically come into play. I think that I am bound to start here by finding that, on the facts, at any rate, I am persuaded by the evidence that the plaintiff did slip. He is an active young man, very well-built and compact, and, I should imagine from the look of him, accustomed to taking a good deal of exercise. He does not look clumsy, not the sort of man who would tumble over merely because he was hopping, even when he saw a very much taller man, Mr. Ryan, bearing down on him. I think that he did slip, and that he slipped on something. I have not seen his shoes, and have heard nothing about them except that they were rubber shoes, and I think I ought to assume that they were in reasonable order. When I find that this floor was polished, and when other people like Mr. Ryan and Mr. Taylor also said the same thing—namely, that they slipped on this floor when, apparently, they found no similar tendency to slip on the floor at the Paddington Baths—I think that I am bound to find that he slipped because of the condition of this floor.

It one looks to see what that condition was, it is not very difficult to find it, because what distinguished this floor from other floors was that it was a fairly highly polished floor, suitable for dancing. I am bound to say, on the facts, that it does not seem to me to be very suitable for this sort of physical exercise. No doubt you might have people there day after day and week after week and nobody might fall and hurt himself. Nevertheless, it was a matter which obviously struck people from the first as one which needed consideration, because it was debated whether it would be wise to put down some sort of drugget or matting, and it was thought, and I think rightly, that it would be better not to do so. It was certainly felt by Mr. Crane, the instructor actually in charge of this class, that this floor was wholly unsuitable—and, indeed, dangerous—for what he called gymnastic work, although he had come to the conclusion that it was safe for the particular exercise which was being performed at the time. I do not think that it was safe. I think that it was dangerous, and that this accident has certainly proved that it was dangerous. The question that remains is, therefore, whether there was a breach of the warranty that it should be reasonably safe. I should not say for a moment that, because many people might think that a soft-wood floor was better than a hard-wood floor, because a hard-wood floor was more slippery, therefore there was any negligence in having a hard-wood floor. It is a choice, I will not say of evils, but between two not perfect surfaces. However, where you get hard wood plus polish of this kind, I do not think that it is possible to say that it was reasonably safe. It certainly was not safe on the facts as I have found them, and I do not think that it is right to say that it was reasonably safe.

I regret, in some ways, having to give a decision which may make things a little difficult for the council, and which perhaps may make it less easy for them to provide suitable places for physical training; but,

after all, people who accept their invitation are entitled to assume that they are to be provided with premises where they can safely conduct any activities which they are bidden to conduct by the instructor in charge. That leads me to the question whether anything can remain here of the defence *volenti non fit injuria*—that is, that the plaintiff cannot complain because he agreed to take the risk, and was willing to run any risk there was. It is plain, in my view, on the evidence, that he did nothing of the sort. He trusted to those who had invited him and to those who were, so to speak, in command. It never occurred to him that he was being asked to do anything dangerous in a dangerous place. Of course, he took certain risks. Anybody who plays a game which involves any bodily violence or is content to hop about on one leg lunging at somebody else takes certain risks, and, if he fell down in the normal way, he cannot complain, just as anybody who is unfortunate enough to break his collar-bone on the football field in the ordinary way has no right to claim damages at law against anybody else. Here, however, there was added danger, in my view. He did not assume the risk willingly. I think that it did not occur to him that there was an added danger, and, with that added danger there, he was entitled to assume that it was safe. I do not think that it was safe, and, on that ground, the warranty being as I have stated it, I think that the plaintiff succeeds. I suppose that, by adopting the same reasoning, one might say that there was a failure on the part of the defendants or their agents to take reasonable care.

In those circumstances, fortunately, the damages are not very heavy, because there is no permanent injury at all, or, if there is, it is so slight that apparently the plaintiff will never notice it, so that I can disregard it. I do not think that a young man like this wants much money for pain and suffering, and so on. I think that, if I give him a sum of £220 in all, that will adequately cover the injuries he has suffered. There will be judgment for that amount with costs.

Judgment for the plaintiff for £220, with costs.

Solicitors: *W. B. Blackwell & Co.* (for the plaintiff); *J. R. Howard Roberts* (for the defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

SRIMATI PREMILA DEVI v. PEOPLES BANK OF NORTHERN INDIA, LTD. (IN LIQUIDATION).

GOBIND RAM KAPUR v. PEOPLES BANK OF NORTHERN INDIA, LTD. (IN LIQUIDATION).

DUNNI CHAND v. PEOPLES BANK OF NORTHERN INDIA, LTD. (IN LIQUIDATION).

[PRIVY COUNCIL (Lord Wright, Lord Romer, Lord Porter, Sir Shadi Lal and Sir George Rankin), **July 7, 8, October 17, 1938.**]

Privy Council—India—Companies—Shares—Forfeiture—Forfeiture contrary to scheme of arrangement—Observance of technicalities—Whether ratification of invalid forfeiture possible.

The respondent bank was incorporated in 1925 with a capital of 50 lacs of rupees divided into 50,000 shares of Rs.100 each. These shares, all of which were issued, were called A shares. In 1926, the capital was increased by another 50,000 shares of Rs.100 each, of which 25,000, called B shares were then issued. On the issues of the A and B shares, Rs.50 per share had been called up. In 1931, the bank suspended payment. A scheme of arrangement between the bank, its creditors and shareholders was then prepared, approved and sanctioned by the court in Dec., 1931, but, in July, 1932, it became necessary for an amended scheme of arrangement to be drawn up, and this was sanctioned by the court on Nov. 15, 1932. In the meantime, the directors had, by resolution dated Mar. 15, 1932, made a call of Rs.20 in respect of the A and B shares, of which Rs.10 was to be paid on or before Apr. 30, 1932, and Rs.10 on or before May 20, 1932. The amended scheme was in due course submitted to meetings of the creditors and shareholders respectively, approved by them, and sanctioned by the court in Nov., 1932. One of the provisions of the amended scheme was that further calls on capital of A and B class shares would not exceed 25 per cent., 20 per cent. having been already called, thus leaving only a further call of 5 per cent. to be made. The amended scheme, however, went on to provide that the calls of 25 per cent. should be distributed in 5 calls of 5 per cent. payable each half-year, the first on July 1, 1932, and the last on July 1, 1934. The directors thereafter passed a resolution that the last 5 per cent. called should be payable on Feb. 26, 1933, thus completely ignoring the amended scheme. On Mar. 25, 1933, the directors purported to forfeit certain shares by reason of non-payment of the calls of 25 per cent., in accordance with these resolutions. The bank having later gone into liquidation, the liquidator contended that the forfeitures were *ultra vires*, and contended that the names of the holders of these shares should be included in the list of contributories. He then applied to the court to settle the list of contributories, to which application the court acceded, declaring the shares wrongly forfeited, and rectifying the register by replacing the names of the shareholders thereon and placing such names on the list of contributories. The question upon this appeal was whether or not that decision was a correct one, and it was further contended that the forfeitures had been ratified by the whole body of creditors and shareholders by the issue to them of certain balance sheets, by the discussion of the matter at meetings, and by reason of the fact that the validity of the forfeitures had never been challenged :—

HELD : (i) the forfeitures were *ultra vires* the bank.

(ii) in view of the binding character of the scheme sanctioned by the court, no variation of, or departure from, that scheme could be validated by the mere acquiescence of the shareholders and creditors.

(iii) in the matter of forfeitures of shares, technicalities must be strictly observed.

[EDITORIAL NOTE.] Generally speaking, a company in general meeting can ratify an act of directors that is *ultra vires*. In the present case, it was sought to show that a forfeiture of shares had been so ratified when that forfeiture was based on a resolution contrary to the provisions of a scheme of arrangement sanctioned by the court. It is pointed out that any variation of such a scheme requires the sanction of the court, and that, therefore, the ratification contended for was impossible in law. A

AS TO FORFEITURE OF SHARES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 286-289, paras. 492-496; and FOR CASES, see DIGEST, Vol. 9, pp. 424-432, Nos. 2741-2814.]

Cases referred to :

- (1) *Spackman v. Evans* (1868), L.R. 3 H.L. 171; 9 Digest 428, 2779; 37 L.J.Ch. 752; 19 L.T. 151; *affg.* S.C. *sub nom.* *Re Agriculturist Insurance Co., Spackman's Case* (1865), 5 New Rep. 385. B
- (2) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366; 9 Digest 479, 3141; L.R. 4 Ind. App. 86; 46 L.J.P.C. 87; 37 L.T. 176.

CONSOLIDATED APPEALS from an order of the High Court of Judicature at Lahore (YOUNG, C.J., and MONROE, J.), dated Mar. 16, 1936, made upon an application by the official liquidator of the respondents, the Peoples Bank of Northern India, Ltd. C

A. M. Dunne, K.C., and *J. M. Pringle* for the appellants.

Lionel L. Cohen, K.C., and *W. Wallach* for the respondent bank. D

The judgment of their Lordships was delivered by LORD ROMER.

LORD ROMER : These are three consolidated appeals from an order of the High Court of Judicature at Lahore dated Mar. 10, 1936, made upon an application by the official liquidator of the respondents, the Peoples Bank of Northern India, Ltd. The question to be determined is whether or not the appellants should be placed upon the list of contributories notwithstanding the fact that in 1933 the directors of the bank purported to forfeit the appellants' shares, and removed the appellants' names from the register of members in respect thereof. E

The bank was incorporated in 1925 under the Indian Companies Act with a capital of 50 lacs of rupees divided into 50,000 shares of Rs.100 each. These shares, all of which were issued, were called A shares. In 1926, the capital was increased by another 50,000 shares of Rs.100 each, of which 25,000, called B shares, were then issued. In 1929, some of the remaining 25,000 shares were issued, and were called C shares, but with these the present appeals are not concerned. On the issue of the A and B shares, Rs.50 per share had been called up. F

Of the articles of association of the bank (before they were amended in manner hereinafter stated) those that are material for the present purpose were as follow : G

34. Whenever any call, or instalment of a call, payable by any member shall not have been paid on the appointed day, the company may at any time thereafter during such time as such call or instalment shall remain unpaid, send a notice requiring payment by such further day, and at such place or places where the calls of the company are usually made payable, of such calls or instalments, in arrear, with interest thereon, at the rate of 9 per cent. per annum from the day on which such call or instalment ought to have been paid, and such notice shall state, that H

in the event of non-payment at the time and place appointed of the arrear incurred and interest thereon, together with such expenses (if any) as may be incurred in and about the collection or recovery of such call or instalment and interest or any of them, the share in respect of which such call was made will be forfeited without further notice.

A 35. If the requisitions of any notice given pursuant to cl. 34, shall not be complied with, any share in respect of which such notice shall have been given may, without further notice at any time thereafter, unless payment of all calls, interest and expenses, due in respect thereof has been made, be forfeited by a resolution of the directors to that effect.

36. Any shares forfeited under these articles shall be deemed to be the property of the company, and may be sold or re-allotted or otherwise disposed of, in such manner as the directors shall approve.

B 37. Until any share so forfeited shall be sold, re-allotted or otherwise disposed of, the forfeiture thereof may, at the discretion and by a resolution of the directors, be remitted on such terms as the board may in their discretion think fit.

40. All calls in respect of shares shall be made at the discretion of the directors and shall be payable to the person or persons and at the time and place or places appointed by them:

C 44. If the call or instalment of a call payable in respect of any share is not paid by the day appointed for payment thereof the holder for the time being of such share shall be liable to pay interest for the same at the rate of Rs.9 per cent. per annum from the day appointed for payment thereof to the time of actual payment.

45. The directors may, if they shall think fit, receive from any member willing to advance the same, all or any part of the moneys for the time being remaining uncalled on his share beyond the calls then actually made, and in case they shall so think fit they shall pay dividend upon the moneys so paid in advance or upon so much thereof as shall from time to time remain in advance of the calls then made upon the share, in respect of which such advance has been made, in addition to the dividend payable on such part of the capital as is actually called and paid up.

D 46. If the directors shall see fit to receive in advance any such moneys, aforesaid, they may pay interest upon the same, or upon so much thereof as shall from time to time remain in advance of the calls, at such rate not exceeding 6 per cent. per annum as they shall think fit, such interest to be in lieu of the dividend provided by the preceding clause upon such moneys so paid in advance.

E On Sept. 29, 1931, the bank suspended payment. Shortly afterwards, a scheme of arrangement between the bank, its creditors and shareholders was prepared, and, after being approved in the usual way at meetings of the creditors and shareholders, was duly sanctioned by the court under sect. 153 of the Indian Companies Act upon Dec. 22, 1931. The details of that scheme are not relevant to these appeals. However, by F July 25, 1932, it had become evident that the scheme was not likely to attain the end which its promoters had in view—namely, the successful resuscitation of the business of the bank—and accordingly on the last-mentioned date an amended scheme of arrangement was brought before the court. In the meantime, the directors had, by resolution G dated Mar. 15, 1932, made a call of Rs.20 in respect of the A and B shares, of which Rs.10 was to be paid on or before Apr. 30, 1932, and Rs.10 on or before May 20, 1932. The amended scheme was in due course submitted to meetings of the creditors and shareholders respectively, and, having been approved by them, was sanctioned by the court H on Nov. 15, 1932. The only provisions of this scheme that are relevant to the present appeals are those contained in cl. 6, which, so far as material, is in these terms:

6. That for the purposes of the revival of the bank it be distinctly laid down that further calls on capital of A and B class shares of which Rs.50 and 25 lacs have been respectively subscribed will not exceed 25 per cent., 20 per cent. having been already called; thus leaving only a further call of 5 per cent. to be made.

This 25 per cent. call will be redistributed into 5 calls of 5 per cent. each payable every half-year starting from July 1, 1932.

This clause is not expressed as clearly as it might have been, but their Lordships entertain no doubt as to its meaning. Before Mar., 1932, Rs.50 had been called up on each of the A and B shares. On Mar. 15, a further Rs.20 had been called up, as already stated. The clause provided that, for the purpose of the revival of the bank—i.e., for the purpose of the scheme—a further call of Rs.5 should be made in respect of such shares, and no more. Had the clause stopped there, the dates for payment of the Rs.20 call would have been those already fixed by the directors—namely, as to Rs.10 thereof, Apr. 30, 1932, and, as to the remaining Rs.10, May 20, 1932. The further call of Rs.5 would have become payable on such date as might be fixed by the directors when making the call under art. 40. However, the clause went on to fix the dates on which both the Rs.20 call already made and the Rs.5 call to be made thereafter should be paid. The whole 25 per cent. was “redistributed,” and was to be paid in five instalments of 5 per cent. each, payable on July 1, 1932, Jan. 1, 1933, July 1, 1933, Jan. 1, 1934, and July 1, 1934. It only remained for the directors to pass a resolution making the further call of Rs.5 under art. 40, and such call would, by virtue of the scheme, become payable on July 1, 1934. No further resolution was necessary in respect of the Rs.20. In the words of cl. 6, it had “already been called.” The resolution of Mar. 15, 1932, therefore, remained unaffected, except that the dates for the payment of the Rs.20 were altered.

It is to be observed that one effect of the amended scheme, when it came into operation on Nov. 15, 1932, was to make the instalment payable on July 1, 1932, a call in arrear. Another effect was that A and B shareholders who had punctually paid the call made on Mar. 15, 1932, were probably entitled to be treated as having paid moneys on their shares in advance of calls within the meaning of arts. 45 and 46. These circumstances no doubt introduced some complication into the matter, but it was nothing compared with the complication introduced by the subsequent proceedings of the directors, to which attention must now be called. On Jan. 18, 1933, they held a board meeting. Their Lordships regret to say that the record of proceedings supplied to them on these appeals would seem to have been prepared with the view of making the discovery of any particular document as laborious a task as possible. However, a diligent search (for no assistance will be obtained from the index of reference) will reveal a minute of this board meeting. According to this minute, the directors, after referring to cl. 6 of the scheme, and after recording the fact that many shareholders had made default in payment of the 10 per cent. calls made in the preceding March in whole or in part, passed the following resolutions :

(a) That the remaining call of 5 per cent. on A and B shares as provided for in cl. 6 of the annexure A be made now under art. 34 payable on or before Feb. 26, 1933, and that these shareholders who are partly or wholly in default of already outstanding calls should be called upon under art. 35 to pay up the arrears due

with interest at 9 per cent. per annum calculated from due dates to Jan. 31, 1933 ; at the registered office of the company at Lahore, Bharat Buildings, on or before Feb. 26, 1933, in office hours, and that notices to this effect as required by arts. 34 and 35 respectively be served on all A and B shareholders and also on the defaulters, intimating to the latter, i.e., defaulters, at the same time that in the event of non-payment at the time and place appointed all the arrears incurred and interest thereon together with such expenses (if any) as may be incurred in and about the collection or recovery of such calls and interest or any other, the share in respect of which such calls were made will be forfeited without further notice ; and that a meeting of the board will be held on Feb. 27, 1933, to effect forfeiture of the defaulters of the two 10 per cent. calls and the 5 per cent. call or any of them ; and that to the defaulters who pay up at least 5 per cent. on account of three calls (two of 10 per cent. each of Mar. 15, 1932, and one of 5 per cent. of Jan. 18, 1933) made before Feb. 26, 1933, as an instalment under cl. 6 of the revised scheme.

- A of which such calls were made will be forfeited without further notice ; and that a meeting of the board will be held on Feb. 27, 1933, to effect forfeiture of the defaulters of the two 10 per cent. calls and the 5 per cent. call or any of them ; and that to the defaulters who pay up at least 5 per cent. on account of three calls (two of 10 per cent. each of Mar. 15, 1932, and one of 5 per cent. of Jan. 18, 1933) made before Feb. 26, 1933, as an instalment under cl. 6 of the revised scheme.
- B (b) That a compromise under art. 37 be offered to those shareholders who accept the following terms in regard to the amounts due on account of three calls totalling 25 per cent. and interest due up to Jan. 31, 1933, in terms of cl. 6 of the annexure A and but having paid 5 per cent. as per terms of compromise proposed before Feb. 26, 1933, and agreeing to pay the remaining 20 per cent. of calls and interest due as above cited : 5½ per cent. on all shares held by him on or before June 15, 1933, 5½ per cent. on all shares held by him on or before Dec. 15, 1933, 5½ per cent. on all shares held by him on or before June 15, 1934, 5½ per cent. on all shares held by him on or before Dec. 15, 1934, at the head office of the bank between office-hours on working-days and further agreeing that in the event of making a default in any of the instalments as fixed here above, the bank's board could take the action as provided for in arts. 34, 35 and 36 of the bank's articles of association.
- C

- These resolutions betray a complete misappreciation on the part of the directors of cl. 6 of the scheme. They had no right whatsoever to make
- D the remaining call of 5 per cent. payable on or before Feb. 26, 1933. It is, moreover, quite apparent that, in passing this resolution, they treated the clause as in no way affecting the dates originally fixed for payment of the 20 per cent. call made in Mar., 1932, and that they were requiring payment of the whole of this call (so far as not already paid) on or before
- E Feb. 26, 1933. This, again, they had no right to do. The most that they could have done in respect of this 20 per cent. call was to send a notice under art. 34 requiring payment by Feb. 26, 1933, of the two instalments of 5 per cent. payable on July 1, 1932, and Jan. 1, 1933, with interest at 9 per cent. per annum from those dates respectively,
- F with an intimation that the shares would be forfeited in default of payment of such instalments, interest and expenses as mentioned in the article. It would also have been within the competence of the directors, after any such forfeiture, to offer a compromise under art. 27 to those members who had paid 5 per cent. before Feb. 26, 1933, but they would
- G have had no conceivable right to make it a term of such compromise that the instalments that were payable under the scheme on July 1, 1933, Jan. 1, 1934, and July 1, 1934, should be paid on any other dates.

- It is perhaps understandable that the directors should have failed to appreciate the true effect of cl. 6 of the scheme, and have thought that
- H it in no way altered the dates for payment of the 20 per cent. call made in Mar., 1933. What is not so understandable is that, entertaining the views they did as to the meaning of the clause, they should at the same meeting have passed the following resolution :

Resolved that the following sub-clauses be added to art. 46 (by two extraordinary general meetings).

That such shareholders who had paid the 20 per cent. of two calls 10 per cent. each payable on Apr. 30, 1932, and May 20, 1932, before Jan. 18, 1933, shall be paid interest at the rate of 6 per cent. per annum from date of payment up to Jan. 31, 1933, and thereafter interest will run on the non-adjusted balance out of the remaining 15 per cent. as per cl. 3 hereof at the rate of 6 per cent. per annum under art. 46 treating the balances at any time as an advance.

Art. 46 was subsequently amended in accordance with this resolution. A
What may be the meaning of the words "non-adjusted balance out of
the remaining 15 per cent. as per cl. 3" their Lordships are quite unable
to determine, but it is plain that interest could be allowed to the share-
holders who had already paid the two calls of 10 per cent. only if those
calls were in truth payable on July 1, 1932; Jan. 1, 1933, July 1, 1933, B
and Jan. 1, 1934, instead of on Apr. 30, 1932, and May 20, 1932—that
is to say, if the dates originally fixed for payment had been altered by
the scheme. The calls would not otherwise have been paid in advance.
However this may be, the directors on Jan. 23, 1933, sent to the holders
of the A and B shares a notice of the further call of 5 per cent. to be paid C
on or before Feb. 26, 1933, stating that, in default of payment on or
before that date of this further call and of the two previous calls of
10 per cent. each (which they described as payable on Apr. 30 and
May 20, 1932, respectively), with interest on such two previous calls at
9 per cent. per annum from the date of the calls to Jan. 31, 1933, the D
shares would be forfeited without any further notice. It was also stated
that shares could be restored after forfeiture on the basis of the com-
promise mentioned in resolution (b) passed on Jan. 18, 1933. A draft
copy of the compromise was inclosed with each notice.

On Mar. 25, 1933, another board meeting was held. By resolutions E
passed at this meeting the shares of such shareholders (including several
of the present appellants) as had neither made any payment in pursuance
of the notice nor accepted the terms of the compromise were forfeited.
The shares of those members (including the remaining appellants) who
had paid 5 per cent. on or before Mar. 25, 1933, and had accepted the F
compromise were not forfeited at this time, but later on default was
made by them in paying the instalment of 5½ per cent. payable under
the compromise on June 15, 1933, and, by Nov. 11, 1933, the shares of all
the appellants had been forfeited by the directors.

On May 22, 1935, an order was made for the winding up of the bank, G
the official liquidator being appointed the liquidator. By this time, the
names of all the appellants had been removed from the register of
members in respect of the shares which the directors had purported to
forfeit. In the cases where the directors had been able to sell the shares,
the purchasers' names had been entered on the register. The official H
liquidator, however, inserted the names of all the appellants in the list
of contributories, contending that their shares had not been validly
forfeited and that their names had been improperly removed from the
register. In order to have it determined whether this contention was
well-founded, he applied to a judge of the High Court of Judicature at

Lahore to have the list of contributories settled by the court. The question of principle involved was in due course referred by the judge to a Division Bench, consisting of YOUNG, C.J., and MONROE, J., and they delivered their judgment on Mar. 16, 1936. They held in effect that the resolutions of the directors of Jan. 18, 1933, were inconsistent with cl. 6 of the amended scheme, and that the forfeiture of the appellants' shares was *ultra vires* the bank, and of no effect. They rejected the contention of the appellants that the action of the directors had been ratified by the creditors and shareholders, holding that such ratification, even if proved, could not validate an *ultra vires* transaction. They further held, however, that there was no such ratification in fact. They accordingly accepted the application of the official liquidator, and ordered the rectification of the register of members so as to include the names of the appellants and others in the like position, and settled their names upon the list of contributories. From that decision, the appellants, having obtained the necessary leave, now appeal to His Majesty in Council.

In their Lordships' opinion, the judges of the Division Bench came to a right conclusion. Upon confirmation by the court of the amended scheme of arrangement, that scheme became, by virtue of sect. 153 of the Indian Companies Act, binding upon the creditors, the shareholders and the bank alike. Its terms could thereafter only be varied by order of the court after the variation had been approved at meetings of the creditors and shareholders. It was not, therefore, possible for the bank or its directors or shareholders, whether by resolution or ratification or otherwise, to alter the dates fixed by cl. 6 of the scheme for payment of the 20 per cent. called up in Mar., 1932, or the 5 per cent. called up on Jan. 18, 1933. It necessarily follows that the resolution of the directors on the latter date requiring the whole 25 per cent. to be paid with interest on or before Feb. 26, 1933, was an attempt on their part to do something that was *ultra vires* the bank. The offer to the shareholders of the compromise was equally beyond the powers of the bank or its directors, for, apart from the fact that the powers conferred upon the directors by art. 37 only arise after the share has been forfeited, neither the bank nor its directors could vary the scheme under the guise of a compromise with a shareholder. The resolutions (a) and (b) of Jan. 18, 1933, except in so far as they made the call of 5 per cent., and the purported forfeitures of the appellants' shares that followed upon them, were, therefore, inoperative and void.

It was said on behalf of the appellants that, inasmuch as, on Jan. 18, 1933, the two instalments payable on July 1, 1932, and Jan. 1, 1933, were in arrear, the bank, through its directors, could validly have forfeited the appellants' shares. This is true, but it is plain from the terms of the resolutions of Jan. 18, 1933, and of the notice sent to the shareholders on Jan. 23, 1933, and of the resolution of Mar. 25, 1933, that the shares forfeited on this last date were being forfeited for default in

payment of the 25 per cent. by Feb. 26, 1933. This latter resolution was in these terms :

The shareholders in respect of the following A and B class shares having made default in respect of calls of 25 per cent., 20 per cent. having been called on Mar. 15, 1932, and 5 per cent. on Jan. 18, 1933, and having neither offered any compromise as allowed by the General Board Resolution No. 2 dated Jan. 18, 1933, nor having made any payment in terms thereof, it is hereby resolved that these shares be and are forfeited . . . A

It was further contended on behalf of the appellants that, inasmuch as the shares of those who had paid at least 5 per cent. by Mar. 25, 1933, were not forfeited until later, and they were given further opportunities of availing themselves of the compromise, the resolution just set out should be regarded as merely forfeiting the shares for non-payment of the 5 per cent. payable on July 1, 1932. This, in their Lordships' judgment, is an impossible contention, in view of the facts already detailed. It is true that, had the shareholders affected by the resolution paid the 5 per cent., their shares would not have been forfeited at that time. They would have been given a further opportunity of paying. However, from those who had paid nothing the directors may well have thought that nothing was likely to be obtained in the future. Their shares were accordingly then and there forfeited. They were forfeited, however, for non-payment of the 25 per cent., and not merely for non-payment of the 5 per cent. B C D

This may seem to be somewhat technical, but, in the matter of the forfeiture of shares, technicalities must be strictly observed, and it is not, as is sometimes apt to be forgotten, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture, for the forfeiture of shares may result in a permanent reduction of the capital of a company. It will suffice to take the present case as an example. If the forfeitures are upheld, the appellants remain liable, no doubt, for the whole 25 per cent. called up in Mar., 1932, and in Jan., 1933, but they will escape liability altogether in respect of the uncalled 25 per cent., and this is a matter that vitally affects the creditors. These creditors cannot be deprived of their right to have this 25 per cent. made available for payment of their debts without due cause. The creditors are, therefore, entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares has arisen, the articles of association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the shareholder affected. Such provisions may properly be regarded as being directory only, and capable of being waived by the individual shareholder. However, no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess—as, for example, a power to forfeit shares for non-payment of calls that are not yet due. E F G H

It was, however, strenuously contended on behalf of the appellants,

both before the High Court and before their Lordships, that the forfeitures in question had been ratified by the whole body of creditors and shareholders. Such ratification, it was said, was to be implied from the facts that various balance sheets, with reports thereon of the directors showing that the shares in question had been forfeited, had been issued to the shareholders, that the forfeiture of the shares had also been mentioned and discussed at meetings both of creditors and of shareholders, and that no creditor or shareholder had ever challenged the validity of the forfeitures. In view, however, of the binding character of the scheme sanctioned by the court, no variation of, or departure from, that scheme could be validated by the mere acquiescence of the shareholders and creditors, as has already been pointed out in an earlier part of their Lordships' judgment. Even if it be assumed that the forfeitures could be made valid by ratification, however, there is no evidence to which their Lordships' attention has been called which would justify the conclusion that such ratification was in fact given. As was said by LORD CHELMSFORD in *Spackman v. Evans* (1), at p. 234 :

... to render valid an act of the directors of a company which is *ultra vires*, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz., the acquiescence of each and every member of the company. Of course this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders.

By knowledge of the transaction, LORD CHELMSFORD clearly meant knowledge of the invalidity of the transaction. LORD CRANWORTH, in the same case, said, at p. 194 :

Looking to all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular.

Much to the same effect was said by SIR BARNES PEACOCK in delivering the judgment of this Board in *Irvine v. Union Bank of Australia* (2), at p. 375 :

Their Lordships think that it would be competent for a majority of the shareholders present . . . at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority ; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting.

There can in truth be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. In the present case, there is nothing whatsoever to show that, in the balance sheets or reports, or at any meeting, the attention of the creditors or shareholders was called to any illegality or irregularity in the forfeitures of the shares, or that at any material time they had any knowledge of any such illegality or irregularity. Least of all were they told that they were being invited by their silence or otherwise to ratify the forfeitures that had taken place. It was on these grounds

that the plea of ratification was rejected, and, in their Lordships' opinion, was rightly rejected, by the judges of the High Court.

A belated attempt was made by Mr. Pringle, on behalf of some of the appellants, to show that their shares had been forfeited, not for default in payment of the calls of 25 per cent. made in Mar., 1932, and Jan., 1933, but for default in payment of the calls of 50 per cent. made on the original allotment of the A and B shares. However, no such contention was put forward in the High Court or in the printed case for the appellants. The contention is, indeed, in flat contradiction of some of the statements made in the case. In these circumstances, it is far too late to advance any such contention now.

It only remains to mention one other matter. It is said by the appellants that the liquidator is attempting to charge them with interest on the unpaid calls, and that the liability of the appellants as contributories is inconsistent with liability on them to pay such interest. Upon this question their Lordships express no opinion. The only question before them is whether the appellants have been rightly placed upon the list of contributories, and this question should, in their Lordships' judgment, be answered in the affirmative. What the result of this may be is a question that will have to be determined hereafter in the course of the liquidation. It does not arise on this occasion. Their Lordships are of opinion, for the reasons they have given, that these appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeals dismissed with costs.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellants); *Cardew Smith & Ross* (for the respondent).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

PRESTIGE & CO., LTD. v. BRETTELL.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), October 19, 20, 1938.]

Building Contracts—Arbitration clause—What disputes within—Architect refusing certificate—Allegation of improper work.

The builders under a building contract applied to the architect for a certificate. The architect refused to issue the same, on the ground that he had had a complaint from the building owner with reference to the work. The architect stated that he felt it his duty to consult with the building owner prior to issuing the certificate, and concluded: "... in view of my client's assertions, I do not feel that I should be justified in issuing a certificate at this stage. May I, therefore, suggest that you take an early opportunity of seeing him yourselves to discuss this matter?" Upon this, the builders alleged that a dispute had arisen, and claimed that the matter should be referred to an arbitrator under the arbitration clause in the contract. The matter was so referred, and the arbitrator took the view that he was entitled to con-

sider not only the withholding of the certificate, but also the manner in which the work had been done :—

HELD : the court was bound by *Brodie v. Cardiff Corpn.* (1) to decide that the arbitrator had power not only to decide as to the issue of a certificate, but also to make an award of the sum due, having regard to the manner in which the work had been done.

A [EDITORIAL NOTE. In this case, GREER, L.J., has concurred in the decision of the court only with very grave doubt and hesitation. He took the view that the issue of a certificate by the architect was a condition precedent to the liability of the building owner to pay anything. That being the contract between parties who were admittedly *sui juris*, he thought that the court ought not in any way to interfere with it. However, he agreed that the matter was now governed not only

B by the House of Lords case, but also by a decision of the Court of Appeal, and it was impossible to decide the case in any other way than by following those decisions.

AS TO WHAT IS INCLUDED IN ARBITRATION CLAUSE, see HALSBURY, *Hailsham Edn.*, Vol. 3, pp. 321-323, paras. 593, 594; and FOR CASES, see DIGEST, Vol. 7, pp. 431-433, Nos. 389-398.]

C Cases referred to :

(1) *Brodie v. Cardiff Corpn.*, [1919] A.C. 337; 7 Digest 384, 211; 88 L.J.K.B. 609; 120 L.T. 417; *reusg.* S.C. *sub nom.* *Re Nott & Cardiff Corpn.*, [1918] 2 K.B. 146.

(2) *Neale v. Richardson*, [1938] 1 All E.R. 753; Digest Supp.; 158 L.T. 308.

D APPEAL by the defendant against a judgment of GODDARD, J., dated Feb. 16, 1938. The facts are fully set out in the judgment of SLESSER, L.J.

P. E. Sandlands, K.C., and *P. B. Morle* for the appellant.

A. T. Miller, K.C., and *R. A. Willes* for the respondents.

E

SLESSER, L.J. : This is an appeal from a judgment of GODDARD, J., on a claim arising from the award of an arbitrator appointed by the parties to act in certain matters of dispute which might arise between them under articles of agreement dated Dec. 11, 1933. The parties were

F Norman Brettell, who is called the employer, and Prestige & Co., Ltd., the well-known builders, who are called the contractors. The agreement had reference to the erection of certain flats, shops and garages in King Street, Hammersmith, London, the architect being one Hugh Minty. The work started, and there is no question that from time to time, as

G provided in the contract, interim certificates were granted, on which payment was made in the ordinary manner. No dispute arises with regard to that. However, the time came when, on a claim being made for a certificate—I think the tenth in order—the architect, for reasons which appear in the correspondence, refused to grant such a certificate.

H He had been asked on June 1, 1935, to grant the particular certificate which has caused the dispute in the present case. Prestige & Co., Ltd., wrote to him on June 1, 1935, in these words :

We were advised yesterday by Messrs. Gleeds [who had the responsibility of making the necessary measurements on which the amount would be ascertained] that they had submitted their report to you for a further payment in respect of the above contract, and we should, therefore, feel much obliged if you could kindly

let us have your certificate some time during Monday, in order that we may present it for payment on that day.

On June 3, 1935, Mr. Minty, the architect, who, as I have said, was the person responsible for the issue of certificates, answered Prestige & Co., Ltd., as follows :

With reference to your letter of the 1st instant, in view of the many complaints made by my client in connection with this contract, I felt that it was my duty to consult with him prior to issuing any further certificates, with a view to ascertaining whether he was now satisfied with the building, and with this object in view, I had an interview with him this morning. I find that he is, at the moment, far from satisfied ; and one of the defects of which we complain is that the windows have not been painted their requisite number of coats outside as specified. I am only too anxious that this contract should be settled as soon as possible in an amicable manner ; but in view of my client's assertions, I do not feel that I should be justified in issuing a certificate at this stage. May I, therefore, suggest that you take an early opportunity of seeing him yourselves to discuss this matter ?

On that letter, Mr. Miller raised the question, quite apart from any other consideration, whether the admission by the architect in that letter that he felt it his duty to consult with the employers before issuing any further certificate was an impropriety on his part, entailing the same consequences as misconduct on the part of an arbitrator, which might for certain reasons render the award invalid. I only mention that matter because, in my view, we have not before us any material to deal with any such argument. There is no finding, as I read it, either in the award or in the judgment of GODDARD, J., dealing with the matter. I exclude it, therefore, from all consideration in what I shall hereafter say. I assume, for the purposes of my judgment, that the architect has acted, possibly mistakenly in refusing his certificate (certainly, in the view which the arbitrator took, he did so act mistakenly), but not with misconduct, as the word has been used in the authorities. I merely mention that fact since it has been raised in argument, in order to dispose of it by saying that I do not make any such assumption, and make no comment on that letter.

That being considered by the contractors to constitute a refusal to grant a certificate, they ask for arbitration. On June 5, they say :

In view of your failure to issue the certificate to which we are entitled on the above contract, we consider a dispute has arisen between us for settlement by arbitration, and we enclose herewith a submission which we shall be glad if you will kindly sign and return to us as soon as possible.

It is convenient at this stage to refer to the clause in the contract which deals with arbitration. It is cl. 26, under which, on that date, Prestige & Co., Ltd., were seeking for a submission. Clause 26 provides as follows :

Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress or after completion of the works, or after the determination, abandonment or breach of this contract, as to the construction of this contract, or as to any matter or thing arising thereunder (except as to matters left to the sole discretion of the architect) [which are mentioned under certain clauses] or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and

final decision of E. G. Cole, Esq., . . . as to matters concerning the architect. Such reference, except on the question of certificate, shall not be opened until after the completion or alleged completion of the works, unless with the written consent of the employer or architect and the contractor. The arbitrator shall have power to open up, review and revise any certificate . . . save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate . . . had been given.

A Then there follows machinery for dealing with costs. On that, the architect appears to have taken the view that rather wider matters should be considered than that of withholding the certificate. He thought, apparently, that the question of the manner in which the work had been
B done should also be included in the matters for submission. However that may be, the actual notice, dated June '18, which was given to the arbitrator, and reached the arbitrator, is, in my opinion, the only material document upon which reliance can be placed in this case. In considering whether or not the reference which was made under that letter was
C wide enough to include the subject of the award—namely, the order to pay certain sums of money—I do not travel beyond that particular document. It is in the following terms. It is addressed to Brettell, the employer, by Prestige & Co., Ltd., the contractors, and a copy is sent to Mr. Cole, the arbitrator under the contract :

D Dear Sir, We have to inform you that we have been in correspondence with Mr. Minty in regard to his failure to issue a further certificate under our contract of Dec. 11, 1933. We have to advise you that so long ago as the 26th ultimo
Messrs. Gleeds, the quantity surveyors, completed their interim measurements, and reported to Mr. Minty that there was then an amount due to us of £10,667 11s., and we naturally expected that Mr. Minty, in accordance with his duties under the contract, would forthwith issue a certificate for that amount. Mr. Minty, ignoring
E his position of independence under the contract, in the matter of issuing certificates, informs us that he has felt it his duty to consult you before issuing a further certificate, and that, as a result of an interview with you, he suggests that we should discuss the matter ourselves with you. We see no reason to trouble you in the matter, as if there is any question of defects or maintenance items, your architect has full authority under the contract to issue instructions for them to be remedied. We are only concerned with the failure or refusal of Mr. Minty to issue a certificate ;
F and as in effect there is now a difference or dispute under the contract, we give you notice under cl. 26 that such a dispute has arisen, and that we intend to apply forthwith to Mr. E. G. Cole, the appointed arbitrator to hear and adjudicate upon our claim.

On that, it is argued by Mr. Sandlands that that reference is no more than a reference specifically limited to the question whether or not
G Mr. Minty improperly refused to issue a certificate, and that it is not competent under that reference for the arbitrator to travel outside the reference and do what in fact he did—namely, award a sum of £7,500 to be paid to the contractors forthwith. I entirely agree with Mr. Sandlands that, because the agreement itself in terms requires that
H notice of all the matters in dispute shall be given to the other party, the matter is so limited, and also, as a matter of general principle, that the arbitrator cannot travel outside the terms of reference. The question is, reasonably and fairly interpreted, what was the matter which was, under this letter of June 18, referred to the arbitrator ? In that connection, it is, I think, right to say that we are not without authority as

to the effect of the failure of an engineer or architect to give a certificate which he ought to have given, as decided by an arbitrator, on the rights of the parties as a consequence of the failure so improperly to grant a certificate.

I read *Brodie v. Cardiff Corpn.* (1), where this matter was very fully considered, in substance to mean this. Where an arbitrator having A jurisdiction has to decide that something ought to have been done by the architect or engineer which was not done, if the terms of reference are wide enough to enable him to deal with the matter, he may by that decision himself supply the deficiency, and do that which ought to have been done, and produce the result which ought to have been produced, if in B his view what was not done is the only reason why the result of doing what ought to have been done does not follow. In that case, an engineer, who had authority under the contract to authorise the payment of extras in writing, declined to give the necessary written authorisation. It is not necessary here to consider the grounds on which he so refused. C It is sufficient to say that the arbitrator held that the extras ought to have been authorised, although in fact they were not authorised in writing. He gave an award for a sum of money which included extras which had not been authorised in writing by the engineer. BRAY, J., held that he was right in making such an order. The matter then came before D this court, where by a majority (BANKES, L.J., dissenting) it was held that it was not within his competence to make an award for the payment of the money, in so far as the granting of a written order for extras was a necessary condition precedent to the money being payable. In the House of Lords (LORD SUMNER dissenting), the view of BRAY, J., E and BANKES, L.J., was restored. As I have said, that case, to my mind, seems to indicate quite clearly, in the passages which have been read by Mr. Miller and Mr. Sandlands, that the view of the House of Lords was that, if the reference was sufficiently wide to cover the matter, the arbitrator could, by his award, cover it. That is to say, applying F the principle to the present case, if, in this case, on a general consideration, apart from the actual scope of this reference, the arbitrator were to come to the conclusion that the certificate ought to have been granted, he could act as if it had been granted, and order the sum of £10,667 11s. —or, as he ultimately came to a conclusion in this case, the lesser sum G which he actually ordered on this head of £7,500—to be paid. What is material in considering the scope of the terms of reference is to consider what were the matters on which the arbitrator was called on to adjudicate.

In *Brodie v. Cardiff Corpn.* (1), as I read the matter, as stated by BANKES, L.J., in the Court of Appeal, a judgment which is entirely H approved by the learned Law Lords, he sets out what were the matters of contention before the arbitrator in the case, and says, at p. 181 :

The rival contentions on the question were as follows. The corporation contended that all the items were "extras" within the meaning of the construction contract, that the contract provided in the most careful and explicit terms that certain conditions precedent, including a written order from the engineer, must

A be complied with before any claim for an "extra" could be established, that no such orders had been given, that the arbitrator had no power to dispense with any of the conditions precedent, and that, the claim to proceed to arbitration having been made after the works had been executed, all the arbitrator could do would be to express an opinion as to whether written orders ought to have been given or not. On the other hand, the contractor contended that on the true construction of the contract the arbitrator had jurisdiction to make an award in the form in which he had made it, namely, in the form of an award giving to the contractor the money value of the extras which had been executed, and in respect of which in his opinion a written order ought to have been given.

Then BANKES, L.J., comes to the conclusion that the view taken by the contractor was the right view. He says, at p. 184 :

B The dispute between the parties which arises under these circumstances appears to me to be a dispute not merely as to whether the engineer was right or wrong in refusing to treat the work as an extra and to give a written order for it, but the dispute includes the question of what the contractor is entitled to be paid for the work so done, assuming that the engineer ought to have given a written order for it.

C There, as I read BANKES, L.J., you have a situation very similar to the one in this case. That is to say, on a very strict and technical interpretation of the reference, it might be said, as was there said, that all that was being asked was whether the failure or refusal to issue the certificate was well-founded. Alternatively, it might be said that it was reasonable to imply that the reference included the question whether
D the full amount for which such certificate might have been issued, or some lesser sum which the arbitrator thought the contractors were entitled to, should be paid. If I may use the phrase, that would prejudice me in favour of giving to this letter of June 18 the wider interpretation, so as, as has been said in so many cases, to give commercial efficacy to the document. In addition to that, I think that there are actual words
E in the language of the letter of June 18 which support the wider view, because the letter recites at the outset that the quantity surveyors reported to Mr. Minty :

F . . . that there was then an amount due to us of £10,667 11s., and we naturally expected Mr. Minty to issue a certificate for that amount. We are only concerned with the failure or refusal of Mr. Minty to issue a certificate.

The word "only" there has not reference to the fact that they do not want money, but has reference to the earlier desire of the architect to include questions as to the manner in which the work had been done.

G As in effect there is now a difference or dispute under the contract, we give you notice under cl. 26 that such a dispute has arisen.

H Reading that letter fairly, taking both the first and second paragraphs, I think that the complaint was : (a) he has wrongly refused to grant us a certificate ; (b) there is due to us £10,667 11s., which we are unable to obtain, and we ask you, the architect, to settle : (a) whether or not the certificate has been wrongly refused ; and (b) what sum we are reasonably entitled to recover. That is the manner in which I read the terms of reference. It would really produce an astonishing result if any other view were to be taken. It would mean merely a circuitous action, because it would be clear, on it being declared that the

certificate ought to have been granted, if the architect then granted the certificate, that the contractors would be entitled to obtain their money or sue upon it. If they did not, then, in conformity with *Brodie's* case (1), they would be able to say that they should be in a position such as that in which they would be if it had been granted, the case then falling into the category of cases where a certificate has improperly and unreasonably been refused, such as is discussed in *Neale v. Richardson* (2). I am, therefore, of opinion that the arbitrator was entitled to make the award which he did make for the sum of £7,500, and that the judge was right in saying that the terms of reference were sufficient to cover that matter, and that he was entitled to satisfy himself that the certificate had been improperly refused. A B

I pass, therefore, to the other matter, which need not detain us long. There was in addition a further sum of £3,167 awarded. As to that, it has been held by the judge—and I agree with him—that there was no jurisdiction to make that award. I need say no more upon that aspect of this case. However, it has been argued that, in so far as part of this award was bad on the face of it, therefore the whole award—namely, the £7,500 given under para. 2—fell, because the amount given under para. 3 of the statement of claim fell. I see no reason for coming to that conclusion. As it seems to me, those two matters are entirely severable. It being contended that the certificate was improperly withheld, and the question arising how much the contractors were entitled to, there is nothing in the valid award of £7,500 which is in any way prejudiced by the fact that some other money has been given for which there was no authority. The two matters seem to me to stand in quite distinct and different circumstances. The one does not in any way pollute or vitiate the other, on the general principle that, where in an award you have two severable decisions—and these seem to me entirely severable—either can be supported. Therefore, I come to the conclusion that the sum of £7,500 awarded really is not subject-matter for appeal, that that award was right, that the judge was right in so holding, and that this appeal fails. C D E F

MACKINNON, L.J.: I agree that the appeal should be dismissed. The matter was referred to the arbitrator pursuant to the letter of June, 1935, and he made his award nearly a year later, in Apr., 1936. The award consisted of eight separate paragraphs. We are only concerned with para. 1, which directed a payment of £7,500, and para. 8, which dealt with the costs of the arbitration. The remaining paragraphs, paras. 2-7, dealt with matters which, it is agreed, were never within the reference to the arbitrator, and with which he had no jurisdiction to deal. Mr. Miller does not attempt to ask for any judgment enforcing those paragraphs. G H

It was argued by Mr. Sandlands that, since those paras. 2-7 were outside the jurisdiction of the arbitrator, therefore the whole of his award,

including paras. 1 and 8, was unenforceable. I need say no more than that, quite clearly, as we intimated during the course of the argument, the award in para. 1 is absolutely distinct from the other matters, and is entirely severable.

Then Mr. Sandlands says that the judgment enforcing the award on
A para. 1 was wrongly given, because para. 1 awards something outside the reference, and, therefore, beyond the jurisdiction of the arbitrator. What he says is :

I award and direct that the employer does pay to the contractors forthwith the sum of £7,500.

B It is argued by Mr. Sandlands that all the arbitrator was asked to decide was whether the architect ought to have issued a certificate. I am not quite sure whether Mr. Sandlands says that he had no authority to say for how much money that certificate should have been issued, but, if he did, I think that that is clearly wrong. If the reference to him was
C the question whether the architect ought to have issued the certificate, that clearly must include the question of for how much that certificate should be. On Mr. Sandlands' argument, the award would have been perfectly good if it had been in these words : " I award that the architect ought to have given his certificate for £7,500 in June, 1935." I suppose
D that, on that argument, the following formula would also have been correct : " I award that the architect ought to have given a certificate for £7,500 in June, 1935, and that the owner ought to have paid that sum in 14 days." There is one further possible formula. Supposing he had said : " I award that the architect ought to have given a certificate
E for £7,500 in June, 1935, and the owner ought to have paid that sum within 14 days. I therefore direct the owner to pay that sum forthwith." I think that the award in that form would have been within his jurisdiction, and within the matter referred to him.

There is no formal or technical settlement of issues recorded in pleadings,
F or anything of that sort. It was done by the two letters. Reading those two letters reasonably, I think that they mean : " We claim that the architect ought to have given a certificate for a certain sum, and that we ought to be paid that sum." That being so, I think that he would have been right, and thoroughly within his powers, if he had said what
G I have suggested—namely, awarded that the architect ought to have given a certificate for £7,500, that that amount ought to have been paid in 14 days—and that, therefore, when he awards that it is to be paid, what he has done is to use a much shorter set of words. He has left out the full formula that I have suggested, and is merely directing
H that the employers shall pay £7,500. Obviously, that conclusion implies the finding which he might, as I suggest, have added, if he had used greater care about it. In those circumstances, there is no substance whatever in this contention on the part of the employers. It is the merest technicality, relying upon a suggested incorrectness of the words used in the award. Having regard to the real nature of the dispute

which was referred to him, and which was within his powers. I think that it is our duty to concern ourselves with the substance, and not with the form, of the award. On that ground, I find no good reason for upsetting the award, and I think that there is abundant reason for upholding and enforcing it. In the result, I think that the judgment of GODDARD, J., was right, and that this appeal should be dismissed. A

GREER, L.J. : I concur, with very grave doubt and hesitation, in the judgments which have been given. If I had had more time at my disposal, in conformity with, and in the exercise of, my authority as a Lord Justice of this court, I should have desired to have considered my B decision. However, giving the best judgment I can on the materials as they have been presented in the very able argument that has been put before the court on each side, I have come to the conclusion that I am precluded by authority from giving effect to the view which I would otherwise have taken. If there had been no authority to the contrary, C I should have been of opinion that no arbitrator and no court had any power whatever to interfere with the express provisions of the contract between parties who were *sui juris*. There being no case made of duress or fraud, I think that the duty of the court would have been to enforce the contract in accordance with its express words. I read the contract D as meaning that, as a condition precedent to liability to pay anything from time to time during the progress of the work, there must be, first, a certificate of the architect. Without that certificate, there is no legal liability established by the contract to pay any sum whatsoever.

I should also be inclined to accept the view, put forward by Mr. E Sandlands, that there never was in this case any reference to the arbitrator to decide whether or not there was an amount due from the building owner to the building contractor. However, I cannot avoid the consequences of the two decisions which have been referred to by SLESSER, L.J. I cannot read these as being other than decisions that there may be F occasions on which the court may say that, notwithstanding the failure of the claimant to establish that conditions precedent to liability have happened, the court has power to make an order, in the absence of the performance of these conditions, for payment of money which, by the contract, is made dependent upon those conditions. It is because I am G impressed with the effect of the two authorities which have been cited that I am able to agree with the view which has been expressed by my brethren. I cannot read either *Brodie v. Cardiff Corpn.* (1) or *Neale v. Richardson* (2) except as expressing the view that, in the opinion of the House of Lords in *Brodie's* case (1), and in the opinion of this court in H *Neale v. Richardson* (2), an arbitrator to whom a matter is remitted in the form in which it was in this case has the power to dispense with the conditions precedent, and to order that, notwithstanding the non-performance of those conditions precedent, a liability may be established on which money may be ordered to be paid. It is because of the decisions in those

- two cases that I am constrained to concur with the judgment given by my brethren. Nevertheless, I cannot help observing two things. The first is that, in my view, the decision of the House of Lords in *Brodie's* case (1) and the decision of this court in *Richardson's* case (2) are illustrations of hard cases which make bad law. However, I am not
- A** entitled to say that, because superior authorities have decided the other way. They have decided that the law which I otherwise should have considered bad law is in fact good law, and I am bound, sitting here, by the decision of the House of Lords, and by the decision of the Court of Appeal.
- B** I should like to add what I have already said in the course of the argument. In my view, it is a grievous mistake to regard the holding of a man to the contract into which he has entered as a technical matter, which can be regarded as one which may be set aside by the court. It is not a technical matter. The question is as to the effect of the
- C** contract entered into by persons who are *sui juris*. If they have entered into that contract, the objection that the contract involves a condition precedent to liability is not a technical matter at all, but a point of substance, because, however small the consideration may be, if there be consideration for a contract, and if the contract be clear,
- D** and the parties be *sui juris*, they are bound by that contract until it is set aside either by a claim that it has been obtained under duress, or because it was obtained by fraud. I am inclined to think that the better remedy which ought to have been adopted by the respondents in this case would have been an application to set aside the authority of the
- E** architect, as he, having abused his authority, ought no longer to be trusted to decide whether or not a certificate ought to be granted. However, no such proceedings have been taken. An architect, in dealing with questions involving an award, is in a judicial position. He is an arbitrator. If he decides wrongly, or if he refuses to exercise his powers,
- F** then there are methods whereby, by proper application, steps can be taken to remove him from his position as arbitrator in the matters in question. No such proceedings were taken in this case. Therefore, as I have said, I feel bound, upon the two authorities which have been cited, to concur in the decision which has been given by my brethren.
- G** *Appeal dismissed with costs.*

Solicitors: *H. W. Perkins & Co.* (for the appellant); *Leighton & Savory* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

PRATT v. COOK SON & CO. (ST. PAUL'S), LTD.

[COURT OF APPEAL (Slessor, Finlay and Goddard, L.JJ.), November 1, 2, 3, 11, 1938.]

Master and Servant—Wages—Payment otherwise than in coin of the realm—Necessity for written agreement—Agreement between trade union and masters' association—Truck Act, 1831 (c. 37), ss. 1, 2, 3, 4, 8, 9, 23—Truck Amendment Act, 1887 (c. 46), ss. 2, 4, 5, 12. A

Limitation of Actions—Specialty—Right of action conferred by statute—Civil Procedure Act, 1833 (c. 42), s. 3.

The plaintiff was employed as a packer by a firm of wholesale drapers at a weekly wage of 53s., and it was agreed that dinner and tea supplied by the firm were worth an additional 10s. per week. The plaintiff claimed that the above sum of 10s. was an improper deduction under the Truck Act, 1831, ss. 3, 4, and that he was entitled to recover the sums deducted as a specialty debt, so that the period for the purposes of the Statutes of Limitation was twenty years. The defendants contended (i) that the deduction was one they were entitled to make under the Truck Act, 1831, s. 23, but to this it was objected that there was no agreement in writing signed by the plaintiff to permit these deductions, and (ii) that certain agreements made between the plaintiff's trade union and the masters' association were sufficient agreement in writing within the Truck Act, 1831, s. 23. These agreements were signed by an official of the union and the association, but the defendants at all times insisted on negotiating with their own men direct :— B

HELD : (i) there was no deduction made from the plaintiff's wages within the meaning of the Truck Act, 1831, and therefore no necessity for an agreement in writing. C

(ii) (GODDARD, L.J., dissenting) the exemptions given by sect. 23 of the Act apply not only to sect. 2, but also to sects. 1 and 3. D

(iii) (GODDARD, L.J., dissenting) the definition of wages given in sect. 23 is sufficiently wide to include the meals supplied in this case, which can therefore be part of the subject of a contract to supply, although otherwise forbidden under sects. 1 and 2. E

(iv) (*per* SLESSOR, L.J.) this being a penal statute, rendering an employer liable to a criminal charge, it should be construed strictly, should there be any ambiguity.

(v) this being a claim on the statute, had the action been successful, the period of limitation for the claim would have been 20 years. F

Decision of WROTTESELEY, J. ([1938] 1 All E.R. 555) reversed, except on the last point.

[EDITORIAL NOTE. The substantial question in this case is whether the exceptions stated in the Truck Act, 1831, s. 23, are limited in their permissive action to sect. 2 or whether the exceptions are also to be read into sects. 1 and 3. By a majority the court has decided in favour of the latter construction. Upon the question as to the period of limitation in such a case, the court is in unanimous agreement with the court below that this is a claim on the statute, and that the period is, therefore, 20 years. G

AS TO PAYMENT OF WAGES IN KIND, see HALSBURY, Hailsham Edn., Vol. 14, pp. 654-658, paras. 1237-1241 ; and FOR CASES, see DIGEST, Vol. 24, pp. 934-941, Nos. 229-284.] H

Cases referred to :

- (1) *Kenyon v. Darwen Cotton Manufacturing Co., Ltd.*, [1936] 2 K.B. 193 ; [1936] 1 All E.R. 310 ; Digest Supp. ; 105 L.J.K.B. 342 ; 154 L.T. 553.
- (2) *Thomson v. Clanmorris (Lord)*, [1900] 1 Ch. 718 ; 32 Digest 320, 57 ; 69 L.J.Ch. 337 ; 82 L.T. 277.

- (3) *International Bridge Co. v. Canada Southern Ry. Co., Canada Southern Ry. Co. v. International Bridge Co.* (1883), 8 App. Cas. 723; 42 Digest 664, 745.
- (4) *Hart v. Hudson Brothers, Ltd.*, [1928] 2 K.B. 629; 44 Digest 133, 26; 97 L.J.K.B. 804; 139 L.T. 663.
- A (5) *Phillips v. Parnaby*, [1934] 2 K.B. 299; Digest Supp.; 103 L.J.K.B. 575; 151 L.T. 400.
- (6) *Glasgow v. Independent Printing Co.*, [1901] 2 I.R. 278; 24 Digest 937, case k.
- (7) *Aylott v. West Ham Corpn., Sisson v. West Ham Corpn.*, [1927] 1 Ch. 30; 32 Digest 321, 65; 95 L.J.Ch. 533; 135 L.T. 424.
- B (8) *Lamb v. Great Northern Ry. Co.*, [1891] 2 Q.B. 281; 24 Digest 939, 269; 60 L.J.Q.B. 489; 65 L.T. 225.
- (9) *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K.B. 403; [1936] 2 All E.R. 1066; Digest Supp.; 105 L.J.K.B. 767; 155 L.T. 376.
- (10) *Cork & Bandon Ry. Co. v. Goode* (1853), 13 C.B. 826; 32 Digest 320, 59; 22 L.J.C.P. 198; 21 L.T.O.S. 141.
- C (11) *Jarvis v. Surrey County Council*, [1925] 1 K.B. 554; 32 Digest 529, 1839; 94 L.J.K.B. 609; 132 L.T. 745.
- (12) *Gutsell v. Reeve*, [1936] 1 K.B. 272; Digest Supp.; 105 L.J.K.B. 213; 154 L.T. 1.
- (13) *Mather v. Brown* (1876), 1 C.P.D. 596; 20 Digest 127, 1018; 45 L.J.Q.B. 547; 34 L.T. 869.
- D (14) *Cutts v. Ward* (1867), L.R. 2 Q.B. 357; 24 Digest 938, 264; 36 L.J.Q.B. 161; 15 L.T. 614.

APPEAL from a decision of WROTTESELEY, J., dated Feb. 11, 1938, and reported [1938] 1 All E.R. 555.

E Sir William Jowitt, K.C., and G. O. Slade for the appellants.
H. J. Wallington, K.C., and A. Melford Stevenson for the respondent.

Jowitt, K.C.: There is no case where it has been held that, where there is a contract for a sum of money and victuals to be consumed on the employer's premises, and that contract has been duly honoured, there is then any relief afforded by the Truck Acts. It is admitted that these meals were a part of the wages, but there was here no stoppage or deduction. The agreement was a composite one.

F Wallington, K.C.: The wages must be paid in current coin of the realm. If an employer supplies food, the workman must pay for it, and not have it deducted from his wages. This agreement was on a money basis, and therefore this was a deduction, and there was no contract in writing. [Counsel referred to *Lamb v. Great Northern Ry. Co.* (8).]

G Jowitt, K.C.: If the Truck Act, 1831, s. 23, is to be construed in the narrower sense, these employers have been guilty of a criminal offence and are liable under sect. 39 to penalties. Where the court is construing a penal section and there are two possible meanings, it must do so in such a way as not to enlarge the number of criminal offences. With regard to the period of limitation, the Truck Act, 1896, s. 5, lays down a period of 6 months, and, by sect. 12 of that Act, all the Truck Acts are consolidated, so that sect. 5 also applies to the 1831 Act. If all these Acts

are to be read as one Act, it is hard to say that a limitation in one Act should not be applied to others. There is no doubt that a statute is a specialty, but it does not follow that an action brought by means of the statute is one brought upon the statute. This is not an action brought upon the statute. The right of action is conditioned on the contract. If this is in the nature of a sum of money given by a statute to a party aggrieved, then the period of limitation is 2 years. Lastly, if it is an ordinary action on a contract, the period is 6 years. [Counsel referred to *Craven-Ellis v. Canons, Ltd.* (9), *Cork & Bandon Ry. Co. v. Goode* (10), *Thomson v. Clanmorris (Lord)* (2), *Jarvis v. Surrey County Council* (11), *Aylott v. West Ham Corpn.* (7), *Gutsell v. Reeve* (12) and *Kenyon v. Darwen Cotton Manufacturing Co., Ltd.* (1).]

Wallington, K.C. : The real meaning of the evidence was that the plaintiff was getting 63s. per week, and that there was then a deduction of 10s. per week for dinner and tea. Whatever is the recompense for labour, that is the wages, and, if they are not in current coin of the realm, the bargain is illegal. The Act was intended to prevent any firm from making a payment not in money. [Counsel referred to *International Bridge Co. v. Canada Southern Ry. Co.* (3) and *Mather v. Brown* (13).]

Slade, in reply : The period of 20 years only applies when a plaintiff must sue on a statute and on the statute only. If the express contract is void, there is still an implied contract, and the plaintiff does not depend solely on the statute. [Counsel referred to *Cutts v. Ward* (14) and *Aylott v. West Ham Corpn.* (7).] These two Truck Acts are to be construed as one. Therefore, there is only a six-months' penalty : see *Hart v. Hudson Brothers, Ltd.* (4), followed in *Phillips v. Parnaby* (5).

SLESSER, L.J. : From June 16, 1919, until Dec. 1, 1935, the plaintiff, who was a packer employed by the defendants, and, it is now conceded on this appeal, an artificer within the meaning of the Truck Acts, was engaged upon the terms, as found by *WROTTESEY, J.*, that he was to be remunerated for his labour partly by a money payment and partly by the provision of dinner and tea, which were provided by the employer under the employer's roof. According to his evidence, he started work in June, 1919, at the wage of 53s. per week, subsequently increased, *plus*, not minus, dinner and tea. The value of this dinner and tea was admitted by the employers in making the agreement to be 10s. per week, which 10s. the workman used actually to receive in addition to the sum of 53s. per week, but only during his holidays.

On Apr. 9, 1936, the plaintiff issued his writ claiming that the defendants illegally and in breach of the provisions of the Truck Acts had deducted from his weekly wage the sum of 10s. per week. No agreement for such deduction in writing had been made and signed by the artificer, and, on the assumption that there had been a deduction, *WROTTESEY, J.*, came to the conclusion that, in the absence of such agreement in writing, this was not a case protected by the Truck Act, 1831, s. 23, and was

therefore an unlawful deduction. He seems to have accepted the argument for, though not the evidence of, the plaintiff that what in fact was done was to stop his wages to the extent of 10s. per week in respect of the victuals with which he was supplied, and that the employer could only do this if he had obtained an agreement or contract in writing signed by the plaintiff. On the other hand, the judge says that he was satisfied that, throughout the period covered by the claim, the defendants paid the plaintiff partly by the money they paid him weekly and to the extent of 10s. by the meals which they provided. WROTTESELEY, J., said ([1938] 2 K.B., at p. 63; [1938] 1 All E.R., at p. 559):

... ever since 1919, the plaintiff was remunerated for his labour partly and to the extent of 10s. weekly by the provision of dinner and tea which he had under his employers' roof.

He finds that the plaintiff never asked whether he could receive instead of meals their value, or 10s. weekly. Nevertheless, the judge gave judgment in favour of the plaintiff, in accordance with sect. 4 (2) of the Act of 1831, which provides that every artificer shall be entitled to recover from his employer so much of the wages earned by the artificer as shall not have been actually paid to him by such employer in the current coin of the realm, and the amount thus falling due, on the basis of 10s. per week, not having been actually paid to him in the current coin of the realm, but in dinner and tea, amounted to the sum of £397 10s., for which judgment was given. It appears from the report that in the court below Mr. Schiller, appearing for the defendants, had argued, in the alternative, that in this case there was really no question of any deduction at all, and, although the judge does not seem to deal with this aspect of the matter, it seems to me impossible, on the plaintiff's evidence and the finding of the judge that he was remunerated in part in money and in part in kind, to come to the conclusion that this case was one of deduction at all. On this view, the case made by the defendants, as argued before us, was this. They assume that the contract here was to pay part of the wages in kind—to quote the statute, in a manner other than in coin of the realm—and concede that, as the entire amount of the wages was not so paid in current coin of the realm, the Truck Act, 1831, ss. 1, 3, will operate against them unless they can avail themselves of sect. 23 of the same Act.

In these circumstances, it becomes necessary critically to examine the relevant provisions of the statute. Sect. 1 renders illegal, null and void such contracts as the present. It is in the following terms, so far as here material:

In all contracts . . . for the hiring of any artificer, . . . or for the performance by any artificer of any labour . . . , the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null, and void.

Sect. 3 deals with the payment of the wages, as distinguished from the

contract, and declares their payment in goods to be illegal. It is in the following terms :

The entire amount of the wages earned by or payable to any artificer . . . , in respect of any labour by him done . . . , shall be actually paid to such artificer in the current coin of this realm, and not otherwise ; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as herein-after mentioned, shall be and is hereby declared illegal, null, and void.

It therefore becomes necessary, there being here, *ex facie*, an illegal contract and an illegal payment, in that the wages were not made payable or paid in the current coin of the realm only, to have regard to sect. 23 of the same Act in order to discover whether, as the defendants contend, what has here been done constitutes an exception to the general prohibition. Sect. 23 deals with two different subject-matters. The first contains a recital of goods or services which nothing in the Act is to prevent the employer from supplying or contracting to supply to an artificer, and includes medicine, medical attendance, fuel, materials or tools to be used by the artificer employed in his trade if he be employed in mining, and hay or other provender to be consumed by any horse or other beast of burden employed by such artificer in his trade or occupation. Likewise nothing is to prevent the employer from supplying or contracting to supply (here follow words said to be applicable to the present case) to any such artificer any victuals dressed or prepared under the roof of any such employer and there consumed by such artificer. It is also provided by this part of the section that nothing therein contained shall extend or be construed to extend to prevent any employer from demising to any artificer the whole or any part of any tenement at any rent to be thereon reserved. To these exceptions there is added by the Truck Amendment Act, 1887 (which is to be read as one with the Truck Act, 1831), a provision in sect. 4 that nothing in the principal Act or that Act shall render illegal a contract with a servant in husbandry (husbandmen being brought in by sect. 2) for giving him food, drink not being intoxicating, a cottage or other allowances or privileges in addition to money wages as a remuneration for his services. The latter part of sect. 23 of the Act of 1831 deals, not with supplying or contracting to supply, but with deductions, and provides that nothing therein contained shall be extended to prevent any employer from making or contracting to make any deduction from the wages of an artificer in respect of the matters which have already been recited, with a proviso that the deduction shall not exceed the true value of such articles, and shall not be made unless the agreement be in writing and signed by the artificer—the provision to which I have already referred, on which the judge relies, which I have indicated in my opinion has no application to the present case.

It has been argued that sect. 23 is limited in its permissive application to sect. 2 of the Act of 1831, which provides that no stipulation shall

be inserted in the contract as to the manner in which wages shall be expended. Sect. 2 provides as follows :

If in any contract . . . any provision shall be made . . . respecting . . . the place where, or the manner in which, or the person . . . with whom, the whole or any part of the wages due . . . shall be . . . expended, such contract shall be and is hereby declared illegal, null, and void.

- A I agree that, if a contract such as the present were made which would otherwise offend against sect. 2, for example, in that it contained a prohibited stipulation as to the manner in which the wages should be laid out and expended which fell within excepted matters mentioned in sect. 23, the opening words of that section—" Nothing herein contained shall prevent an employer supplying or contracting to supply " the articles there stated—would take those articles out of sect. 2. However, I am quite unable, as a matter of construction, to say that the excepting ambit of sect. 23 is limited to the subject-matter of sect. 2.
- B It seems to me equally to protect contracts offending against sect. 1, and payments offending against sect. 3 in the appropriate cases mentioned in sect. 23. It is to be noted that sect. 23 speaks of the " employer supplying or contracting to supply " the things there mentioned. Sect. 2, like sect. 1, does not deal with supply, but with the contract itself, and the exception from supplying would therefore seem, on the face of it, to be more appropriate to cover the cases contemplated in sect. 3, which deals with payments in goods, rather than to cover those contemplated in sect. 2.

It is to be noted that the definition of " wages " contained in sect. 25 includes anything contracted to be paid, delivered or given as a recompense, reward or remuneration for any labour, and it would appear, to my mind, that the dinner and tea, being delivered or given as a recompense for labour, and so part of the wages, can properly be said to be the subject of supply, or contract to supply, under sect. 23, as part of the extended definition of " wages " otherwise forbidden under sects. 1 and 3.

- F In other words, I think that the intent of sect. 23, though perhaps not expressed in quite such clear language, is the same as that of sect. 4 of the Act of 1887—namely, to provide that nothing in the Act shall render illegal a contract to give food of the kind defined in sect. 23 in addition to money wages as remuneration for services—and, in addition, being in wider language than is sect. 4 of the 1887 Act, covers a " contract to supply " under sect. 23 of the 1831 Act, and extends, not only to the contract under sect. 1, but also to a payment or remuneration in goods under sect. 3 of the 1831 Act, where it is provided that such payment is declared illegal, null and void save as hereinafter mentioned. This is not only a reference to sect. 8 (where it is provided that nothing herein contained shall render invalid a contract for the payment or any actual payment to any artificer of the whole or part of his wages in bank notes), but is an omnibus provision sweeping up sects. 2 and 3 in the permitted exceptions. For these reasons, because the employer has done that which sect. 23 permits, notwithstanding

the *prima facie* prohibitions of sects. 1 and 3, I do not think that it can be said that this artificer is entitled to recover from his employer so much of the wages earned as have not been actually paid to him in the current coin of the realm.

I would add that, this being primarily a penal statute rendering the employer liable to a criminal charge under sect. 9 for entering into contracts or making payments hereby declared illegal, it should be construed strictly, if there be any possible ambiguity in the protection afforded by sect. 23. However, for the reasons I have stated, properly construed, there is no ambiguity. A

On this conclusion the interesting further discussion to which we have listened—whether this action be framed on a specialty with 20 years limitation of action, on a simple contract with six years, on a penalty with two years, or whether it is limited expressly by the Truck Act, 1896, s. 5, to six months—does not arise. If the matter were necessary to be considered, however, I would express the view that, more particularly having regard to the fact that this court has already decided that the original contract, if it be illegal, null and void, has gone, and that the right of the plaintiff is by statute to recover under sect. 4 of the 1831 Act (see my judgment in *Kenyon v. Darwen Cotton Manufacturing Co., Ltd.* (1), at p. 206, and *per* SCOTT, L.J., at p. 212), this claim is a claim on, and not *dehors*, the statute, and that the judge was right in holding that the limitation was to be 20 years. For the reasons I have above stated, however, I do not think it necessary to come to any final determination on this matter. In the result, in my opinion, this appeal should be allowed with costs. B
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FINLAY, L.J. : I agree with both the reasoning and the conclusion arrived at by SLESSER, L.J., and I add a few sentences only because we are differing from the careful judgment given by WROTTESELEY, J., and because I am aware that this court is not unanimous. The question is, of course, primarily one of construction, but it is not perhaps irrelevant to point out that there cannot often have been a less meritorious claim than this. F

From June, 1919, until Dec., 1935, the plaintiff received from the defendants by way of wages a sum which varied, but which may be conveniently taken to have been 53s. per week, and, in addition, he received from the employers dinner and tea, which were admitted to be of the value of 10s. per week. WROTTESELEY, J. (and I entirely accept his finding), states the result of the evidence in this way ([1938] 2 K.B., at p. 63 ; [1938] 1 All E.R., at p. 559) : G

On the evidence I have no doubt that in fact ever since 1920, indeed ever since 1919, the plaintiff was remunerated for his labour partly and to the extent of 10s. weekly by the provision of dinner and tea which he had under his employers' roof. On this finding, it becomes plain that the remuneration was 63s., 10s. of that remuneration being in the shape of food. The plaintiff, having thus received remuneration in this form through 16 years, now claims H

that for the whole period he is entitled to claim 10s. per week. The effect, of course, is that his remuneration, instead of being 63s., which was agreed, becomes 73s., which never was contemplated at all. One would with reluctance arrive at the conclusion that a construction of the statute was correct which would produce such a result, and which

A would also show that the defendants, whose complete innocence in the matter was not questioned by anyone, had committed a criminal offence. I am of opinion, for the reasons stated by SLESSER, L.J., that the plaintiff's construction of the statute is not correct.

The first part of sect. 23 refers to an employer "supplying or contracting to supply" various things stated in the section. It seems to me that this has reference, not merely, as was suggested, to sect. 2 of the Act, but to sects. 1, 2 and 3. Mr. Wallington, in the course of his argument, said, in answer to a question, I think from me, that his construction of sect. 23 was that it was really a section dealing only with

C deductions, and that the first part of the section was merely introductory and leading up to the second part—that relating to deductions—which was, so he said, the really operative part of the section. I can only say that that does not seem to me to be a possible view as a matter of construction. It seems to me that sect. 23 falls into two distinct parts,

D intended to have a separate and distinct operation. The first part excepts from the Act the supplying or contracting to supply the articles therein defined. The second part of the Act relates to the stoppages and deductions. I can see nothing which can deprive the first part of the Act of the effect which the words seem, on their natural construction,

E to bear, nor do I see how it is possible to limit the permissive effect of that part of the section to cases where the various articles named were supplied or contracted to be supplied not as part of the remuneration of the artificer. I may add that this construction is, I think, aided by the definition section, which shows that things other than money may

F be contracted to be paid, delivered or given as remuneration for labour done. For these reasons, and desiring, as I do, to accept the reasoning in the judgment of SLESSER, L.J., I am of opinion that this appeal ought to be allowed. I should like to add that, though this aspect of the matter does appear to have been presented in argument to WROTTESELEY,

G J., it would seem from his very careful judgment that it was not prominently in his mind. Taking the view I do, it is not necessary to deal with the somewhat technical and difficult question of limitation. I may say, however, that on that point I should not be disposed to differ from the opinion of WROTTESELEY, J.

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GODDARD, L.J. : Two questions are raised in this appeal, (i) whether the plaintiff has a cause of action under the Truck Act, 1831, s. 4, and (ii) if he has, what period of limitation applies to his action. Certain questions which were raised at the trial—such as whether the plaintiff was engaged in manual labour—have been abandoned by the appellants.

and the only facts which are necessary for the determination of the appeal are really not in dispute. The respondent was engaged by the appellants as an artificer as defined in the Act at a wage of 53s. per week, plus dinner and tea, and, though the rate of 53s. was varied from time to time, the wage always consisted of a sum of money and the meals which I have mentioned. A

Sir William Jowitt conceded that the meals must be regarded as being as much a part of the wage as was the money. When the wage was fixed, there is no question but that both parties regarded the meals as worth 10s. per week, so that in money, or money's worth, the plaintiff received the equivalent of 63s. per week. This was the wage paid to other employees engaged in like work at another of the appellants' warehouses, where no facilities existed for the supply of meals. Sir William contended that in the court below WROTTESELEY, J., regarded the case as one in which the wage was 63s. with an agreed deduction of 10s. for meals, and held that, as there was no written agreement providing for this deduction, as required by sect. 23 of the Act, it was unlawful. I think that there is force in this criticism, though to differentiate between paying 53s. plus food of an admitted value of 10s. and 63s. less 10s. for the same food involves a somewhat fine distinction. However, I do not regard the contract as one for 63s. with a deduction for meals. I think that there was a bargain for what has been described as a composite wage, consisting of money and food, and that the real question is whether such an agreement violates the Act. The appellants conceded that it would but for the provision of sect. 23, which, they contend, authorises a composite bargain, provided that the part of the wage which consists of food is food dressed or prepared under the roof of the employer and there consumed by the artificer, as it was agreed the meals in this case were. B
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I approach the construction of the Act bearing in mind that, in the words of SIR NATHANIEL LINDLEY, M.R., regard must be had, not only to the words used, but also to the history of the Act and the reasons which led to its being passed. I must look at the mischief to be cured as well as at the cure provided: *Thomson v. Clanmorris* (Lord) (2). The mischief against which the Act was aimed is well known. It has been described by many writers, and by none more vividly than by Disraeli in Book 3 of his novel *Sybil*. Workmen were forced to take their wages partly, and sometimes wholly, in kind, or they were tied to the employer's shop—the tommy shop, as it was called—for the purchase of necessities. Often wages were paid at such long intervals that the workman could only live by incurring credit with his employer for necessities, for which exorbitant prices were charged. The price was then deducted from his next wages, with the result that sometimes he got no money from year's end to year's end. So sect. 1 of the Act provides that in all contracts for the hiring of an artificer the wages are to be made payable in current coin of the realm, and, if the contract provides for payment in whole F
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or in part in any other manner, the contract is illegal, null and void. It will be observed that the section avoids the whole contract, not merely that part which provides for payment in kind.

A Sect. 2 declares illegal and avoids any contract which provides for the place where, or the manner in which, the whole or any part of wages due, or to become due, are to be spent, and this is extended by sect. 6 of the Act of 1887 to cover, not only wages due, but also wages actually paid. This section was obviously aimed at the Tommy shop. Sect. 3 deals with payment. Sect. 1 is not to be evaded by satisfying the contractual obligation in some manner other than that for which the contract provides. Payment under a contract is to be made in coin, and every payment otherwise than in coin is illegal and void "except as hereinafter mentioned." The exceptions are to be found in sect. 8, which authorises payment by bank notes or cheques, and sect. 23, which contains the exceptions on which the appellants rely. For the purposes
B of this case, sect. 23 reads as follows :

Nothing herein contained shall extend . . . to prevent any employer . . . from supplying or contracting to supply to any such artificer . . . any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer ; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such . . . victuals . . . Provided always, that such stoppage or deduction . . . shall not be
D in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer.

In thus setting out the section, I have omitted words relating to other matters in respect of which agreements and deductions could be made, and have dealt only with food, as Sir William Jowitt agreed that the
E words "in any case" made the requirement of an agreement in writing as applicable to food as it is to the other matters dealt with in the section.

The appellants contend that this section permits a contract to be made for a composite consideration of money and food, provided, of course, that the food is dressed and prepared and consumed under the
F employers' roof, and that this forms an exception, not only to sect. 3, but also to sect. 1. With this construction I cannot agree. Sect. 1 deals with contracts, not with performance, and the prohibition is absolute. Sect. 3 deals with performance—that is, with payment—and the prohibition there is expressly stated to be subject to exceptions,
G which are to be found in sect. 8 and sect. 23. The distinction seems to me to be all important. Payment may be made under sect. 23 by supplying certain foods or services provided there is compliance with the other provisions of the section, but, before one comes to any question of payment, there has to be a contract, and the contract must fix the
H wages in money. Sect. 1 contains no words indicating any exception, and in this respect is conspicuously different from sect. 3. It is said, however, that sect. 23 permits an employer to supply, or to contract to supply, food to the artificer, and that therefore he can contract to supply food to him in return for his services. I do not so read the section. I do not think that it means that the employer can con-

tract to supply food *as part of the wages* despite the plain words of sect. 1. I think that it means that with regard to certain things, and subject to the safeguards provided in the section, what I may call the tommy-shop practice may continue. That is, it permits an agreement to be made in writing whereby the employer may deduct from the employee's wages the cost of goods or services supplied by the one to the other. **A** It is said, however, that the opening words of sect. 23 are very wide, as indeed they are, and are apt to qualify the provisions of sect. 1, as well as those of sect. 3. I have already called attention to the words in sect. 3 which contemplate exceptions and which do not appear in sect. 1, and, in my opinion, the opening words of sect. 23, wide as they are, do **B** not affect sect. 1. At common law, there was nothing illegal in an employer supplying goods or letting a house to his workman, nor does the Act make such things illegal. What is made illegal is supplying goods, houses or services as part of the wage, and deducting, except in respect of a limited class of things, and subject to an agreement in **C** writing, the price or cost from the wages.

In my opinion, the section deals with authorised deductions and the circumstances in which they may be made, and with nothing else. If this be not the right view, I may be permitted to point out that a result curiously favourable to an unscrupulous employer (a description by **D** no means to be applied to Messrs. Cook Son & Co.) might result. If he can make an agreement in which meals are to be part of the wage, it seems to me that the workman must accept whatever meal the employer chooses to provide, and he will have no voice in either quantity or quality. On the other hand, if the agreement is that the employer **E** shall provide food and deduct the cost from the wages, the workman is actually buying the food, and, if he is provided with meals of an amount or quality which do not fairly represent the sum charged by way of deduction, he will have a remedy in damages. Put concisely, the combined effect of sects. 1, 3 and 23 is, in my opinion, that the employer **F** of a manual labourer must agree to pay, and must pay, wages in money, and not in kind. The employer may supply goods or services to the workman, as to any other member of the community, but he can only deduct the price from the workman's wages for such of the goods or services as are specified in sect. 23, and only if the workman has agreed **G** in writing to the deduction being made. For these reasons, I am of opinion that the terms on which the plaintiff was employed are in breach of sect. 1 of the Act, and that consequently the agreement is void. The result is that the respondent is given a right of action by sect. 4 of the Act.

The next question that arises is what period of limitation applies, **H** as his claim extends over a period of 16 years. WROTTESELEY, J., has held that the action is brought on a specialty—that is, that it is one brought on the statute, and not one in which the right of action is given by the statute—so that the period is governed by the Civil Procedure Act, 1933, and is 20 years. Upon this part of the case the appellants took three points, with

which I will deal in order. First, they said that the period of limitation was six months, under the Truck Act, 1896, s. 5, which Act is by sect. 12 to be construed with the Acts of 1831 and 1887 as one Act. They relied particularly on *International Bridge Co. v. Canada Southern Ry. Co.* (3) and *Hart v. Hudson Brothers, Ltd.* (4), which case I may mention was
A considered and applied in *Phillips v. Parnaby* (5). All these cases dealt with the incorporation of the provisions of a later with those of an earlier Act, and appear to afford some support to this contention. On the other hand, the Divisional Court in Ireland have expressed the view that
B sect. 5 of the Act of 1896 only applies to the particular deductions dealt with by that Act : see *Glasgow v. Independent Printing Co.* (6). However, the short answer seems to me to be that here there was no question of a deduction. The plaintiff gets his action because the contract provided for a wage in money and in food, not because there was a deduction from a money wage for food. Secondly, the appellants content that this
C is an action for penalties, and that therefore a period of two years applies. As the judge pointed out, however, the Civil Procedure Act, 1833, s. 3, dealing with penalties, has been confined to sums awarded as punishment, and not to money awarded as compensation. I think that sect. 4 of the Act of 1831 is clearly meant to give compensation to the workman,
D the criminal penalty being imposed by sect. 9 of the Act of 1831. The third point taken was that this was an action not *on* a statute, but given *by* a statute, and that six years is accordingly the proper period of limitation. This presents more difficulty, but, in my opinion, it is really concluded, so far as this court is concerned, by the recent decision of
E the Court of Appeal in *Kenyon v. Darwen Cotton Manufacturing Co., Ltd.* (1), which was a case under the same Act of Parliament. Sect. 4 no doubt gives the workman the right to recover the whole or so much of the wages earned by him as shall not have been actually paid to him by his employer in current coin. Wages must be earned under a contract, and Sir William Jowitt contended that this section must be taken
F to reinstate the contract, so to speak, for the purpose of the action. He argues that, if regard must be had both to the contract and to the statute, the action is one given by, and not brought on, the statute : see *Aylott v. West Ham Corpn.* (7). In *Kenyon's* case (1), however, this court
G held that the Act swept away the contract entirely, and that the purpose of sect. 4 was to give the workman a statutory cause of action. I think, therefore, that I am bound to hold that the action is brought on the statute, and that the reference to wages in sect. 4 is not to reinstate the contract for the purpose of the action, but to provide a measure of what
H the workman is entitled to recover. Therefore, I think that on this point also the judgment was right. I would dismiss the appeal.

Appeal allowed with costs. Leave to appeal.

Solicitors : *J. N. Mason & Co.* (for the appellants) ; *Corbin, Greener & Cook* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

GOVERNORS OF QUEEN ANNE'S BOUNTY v. TITHE REDEMPTION COMMISSION.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
November 10, 11, 1938.]*Ecclesiastical Law—Tithe rentcharge—Arrears—Limitation of time for recovery—Excluded period—Limitation period expiring before commencement of excluded period—Tithe Act, 1936 (c. 43), ss. 1, 4 (1), 20.*

The Tithe Act, 1936, abolished tithe rentcharge on Oct. 2, 1936, but preserved the right to recover tithe rentcharge accrued due before that date, subject to the provision that after Apr. 1, 1937, arrears could only be recovered by the tithe commission. After that date no proceedings for arrears could be commenced by the commission until the expiration of one month after the tithe-owner had given particulars of the arrears claimed to the tithe-payer and the commission. The arrears recoverable are limited to two years by the Tithe Act, 1891. On Sept. 30, 1937, the plaintiffs posted to the commission and to the tithe-payers particulars of arrears due on Oct. 1, 1935, and it was admitted that such notices were received on Oct. 1, 1937, and that the receipt on such date was in time for the purposes of the two years' limitation prescribed by the Tithe Act, 1891, which period would expire at midnight Oct. 1-Oct. 2, 1937. It was also admitted that, upon such receipt on Oct. 1, 1937, the period of one month above referred to would commence immediately after midnight on Oct. 1-Oct. 2, 1937. By the Tithe Act, 1936, s. 20 (10) (a), in the calculation of the two years' limitation period, time after the service of the particulars by the tithe-owner during which proceedings cannot be commenced is to be excluded. The proceedings for recovery of the arrears were commenced in the county court on Nov. 2, 1937 :—

HELD : (i) the proceedings were out of time because, upon the proper construction of the Tithe Act, 1936, s. 20 (10) (a), the last day for bringing proceedings was Nov. 1, 1937,

(ii) the Tithe Act, 1936, s. 20 (10) (a), cannot be construed as referring to the exact time at which notices are served or proceedings begun, and the legislature did not thereby intend to deal with fractions of a day; and the words "time after" in that proviso refer back to subsect. 3 of that section.

[EDITORIAL NOTE.] In this case, the Court of Appeal have affirmed the decision of MORTON, J., upon the construction of the Tithe Act, 1936, s. 20 (10) (a). Put shortly, the contentions are, on the one hand, that the words "time after" are a mere reference back to the words "one month after" in subsect. (3), and, on the other hand, that these words refer to the actual time after the moment of service. The Court of Appeal have adopted the former construction, on the ground that it fits in better with the whole scheme of the section, and leads to a consistent construction of the Act taken as a whole.

AS TO COMMENCEMENT OF A PERIOD OF TIME, see HALSBURY, 1st Edn., Vol. 27, Time, pp. 449, 450, paras. 888, 889; and FOR CASES, see DIGEST, Vol. 42, pp. 946-951, Nos. 190-238.]

Cases referred to :

(1) *Lester v. Garland* (1808), 15 Ves. 248; 42 Digest 947, 203.

(2) *Clarke v. Bradlaugh* (1881), 8 Q.B.D. 63; 42 Digest 964, 392; 51 L.J.Q.B. 1; 46 L.T. 49.

- (3) *Webb v. Fairmaner* (1838), 3 M. & W. 473 ; 42 Digest 950, 232 ; 7 L.J.Ex. 140.
- (4) *Goldsmiths' Co. v. West Metropolitan Ry. Co.*, [1904] 1 K.B. 1 ; 42 Digest 950, 237 ; 72 L.J.K.B. 931 ; 89 L.T. 428.
- (5) *South Staffordshire Tramways Co. v. Sickness & Accident Assurance Assn.*, [1891] 1 Q.B. 402 ; 42 Digest 955, 278 ; 60 L.J.Q.B. 47 ; 63 L.T. 807 ;
 on appeal, [1891] 1 Q.B. 406.

APPEAL by the governors of Queen Anne's Bounty from a judgment of MORTON, J., delivered on July 27, 1938, and reported [1938] 3 All E.R. 664. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

H. B. Vaisey, K.C., F. R. Evershed, K.C., and A. H. Armstrong for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and Hubert Hull for the respondents.

- C** *Evershed, K.C.* : Before the passing into law of the Tithe Act, 1936, the position as to the running of time was governed by the Tithe Act, 1891, s. 10 (2), which provided that unpaid tithe had to be sued for within a period of two years after the tithe became due, or it was irrecoverable. The question in the present case arises owing to a further period being
- D** inserted into the period of two years. Under the 1936 Act, there was a period in which no proceedings could be taken, a suspension in the running of the period of two years contained in the 1891 Act. The tithe which is the subject-matter of these proceedings fell due on Oct. 1, 1935. The notices were sent by the appellants on Sept. 30, 1937. They
- E** had one day left in which they might have instituted proceedings against the tithe-payers. The question is whether the tithe-owners are to lose the benefit of that one day. The Tithe Act, 1936, s. 20 (10) (a), means precisely what it says, and the period of time which elapses after the service of a notice is excluded in reckoning the period of two years.
- F** The notices were sent on Sept. 30, and it has been established that many of them were received on Oct. 1. The period of exclusion begins with the time when the tithe-owner serves the notice, and ends with the period before which legal proceedings may not be commenced. That period is referred to as a period of one month after service of the notice.
- G** One month after service of the notice, however, excludes the day of the service of the notice. Therefore it was said against the appellants that time after the tithe-owner has served the notice must exclude the day of such service, with the result that the appellants lose Oct. 1. Though that may well be so for the purpose of calculating when a period
- H** ends, in this section, it can only refer to the time when the notice was served, and the two things are different. It is suggested that, before the exclusion period began to run, the time for recovery was barred. It cannot be disputed that the tithe-payer had a full period of one month, excluding the day on which the notice was served upon him. If it be right that the tithe-payer is given that full period of one month, does it

not follow that he can effectively serve a notice on the day on which he receives notice? Although the day on which the notice is served is excluded for the purpose of calculating the month, it does not follow that on that day the tithe-payer himself can do nothing. The foundation of the present rule regarding the computation of a period is found in *Lester v. Garland* (1). The appellants say that, as the notice was served on Oct. 1, the tithe-payer or the tithe redemption commission has the whole day. *Prime facie*, sect. 20 (10) should be taken to mean what it says. Although the law does not take fractions of a day into consideration as a rule, it will do so where the purposes of justice demand it, as in *Clarke v. Bradlaugh* (2). It is important to notice that the time indicated, in the present case, is taken out of a longer period which began to run on Apr. 1, 1937. The contention that the tithe-payer could not serve his notice under sect. 20 (4) on the same day as that on which he received the notice from the tithe-owner is unarguable. [Counsel referred to *Webb v. Fairmaner* (3), *Goldsmiths' Co. v. West Metropolitan Ry. Co.* (4), and *South Staffordshire Tramways Co. v. Sickness & Accident Assurance Assocn.* (5).]

The Attorney-General: It is common ground that the words "from the date on which it became payable" mean "exclusive of the date on which it became payable." One starts with the day on which legal proceedings are commenced, and the problem then is to see whether or not one is within the period allowed. One takes the total time which has in fact elapsed from the date when the tithe became payable. The section goes on to say that time after the period during which proceedings shall not be taken is to be excluded. It is easier to address one's mind to the general purport of this section if one considers a case when the notice was served at some time shortly after Apr. 2. If one looks back to sect. 20 (2), one finds that no legal proceedings can be taken by the tithe-owner after Apr. 1, 1937. If one considers that the tithe became due on Apr. 1, 1935, obviously, unless the tithe-owner himself has initiated proceedings before Apr. 1, 1937, no proceedings in respect of that tithe can ever be taken. Therefore the tithe becomes irrecoverable under this statute unless proceedings have been taken on or before Mar. 31, 1937. The notice in writing can only be served after Apr. 1, and that means that it cannot be served until Apr. 2. That being so, even on the construction that "time after" has the meaning of a month and a day, and not a month only, the tithe-owner lost his right to recover unless he initiated proceedings on or before Mar. 31. Assuming that the argument for the appellants is right, and that "time after" includes Apr. 2, the evening of May 3 is two years, a month, and two days from the time that the tithe became payable. A month and a day is to be deducted. I do not think that one can approach the new limitation terms with any preconceived ideas as to the service of notice. One has to approach them as a new code. Parliament says that it is giving a new code, and that it has taken away a day. The giving or taking away

- of a day is not a matter on which any presumption can be made in construing the words. The prohibition runs from Apr. 1, 1937, as regards tithe which became due on Apr. 1, 1935, unless proceedings have been started. On one construction, the tithe-owner had the whole of the period from Apr. 2 to Sept. 30 in which to serve his notice. He had six months all but a day—even if he had not taken proceedings already—in which to serve his notice. A notice any time up to Sept. 30 would have prevented the period of prescription from expiring, and proceedings could have been taken within a month after the expiration of the notice. The effect of sect. 20 (10) (a) is to extend the two years by a month.
- A** “Time after” means a month after, or the period during which the matter is before the committee. The “time after” during which proceedings cannot be taken can be ascertained only by referring to sect. 20 (3), and it is then found to be a month after. A construction which made the tithe-payer’s liability depend upon the exact hour of the day, and consequently on proof of the actual hour of the day, at which proceedings could be taken is quite impossible. I am asking the court to construe the period in subsect. (10) in the same way as that in which it has been construed in subsect. (3). This suggested losing of a day is an argument in which there is nothing at all. [Counsel referred to
- D** *South Staffordshire Tramways Co. v. Sickness & Accident Assurance Assn.* (5).]

- Vaisey, K.C.*, in reply: This is admittedly a question of difficulty. The latter part of the Tithe Act, 1936, s. 20 (10) (a), should read, in order to make it cohere with the rest of the Act, that, in reckoning the period of two years, so much of the period during which proceedings cannot be commenced by reason of subsect. (3) and subsect. (5) of the same section as has elapsed after service of the notice shall not be reckoned. There is no independent period, during which legal proceedings cannot be commenced, beginning with the service of the notice. For the purpose of ascertaining when the period commences, it cannot be said that it does not follow that it is confined to the period which starts at the end of the day on which the notice was served. Where, from the reckoning of one period, another period is to be excluded, it suffices if the second period begins before the first period ends. If the first period does not end until midnight of Oct. 1-Oct. 2, there is some remainder of the first period, which is the day on which the notice was served, which stands over to be worked out at the end of the second period.
- E**
- F**
- G**

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]:

- H** This is an appeal from a judgment of MORTON, J., upon an originating summons which raised a question as to the recoverability of arrears of tithe rentcharge in the circumstances which I will presently state. The tithe rentcharge in question became payable on Oct. 1, 1935. It belonged at that time to Queen Anne’s Bounty, the present appellants. At the time when the tithe rentcharge fell due, there was in existence

a statutory period of limitation for its recovery under the Tithe Act, 1891, s. 10 (2), which provides as follows :

A sum on account of tithe rentcharge shall not be recoverable under this Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable.

It is common ground that under that provision the two-year period would have expired at midnight on Oct. 1-Oct. 2, 1937. That is to say, the tithe-owner would have had the whole of Oct. 1 in which to issue his writ. The question that arises is due to the fact that, under the Tithe Act, 1936, certain modifications were made in relation to that statutory period of limitation. A

As I have said, the tithe rentcharge (which I will refer to for shortness as the tithe) belonged to Queen Anne's Bounty, but by the Tithe Act, 1936, s. 20 (2), the right to recover the arrears in question vested on Apr. 1, 1937, in the tithe redemption commissioners, who were established by that Act and are the respondents to this appeal. The commission is under a statutory duty, into which I need not go in detail, to take proceedings in certain circumstances to recover arrears of tithe, unless, as provided by the Tithe Act, 1936, s. 20 (8) : B

... they are satisfied, after consultation with the tithe-owner, that the tithe-payer is not legally liable for the payment thereof, or that there is no reasonable prospect of the recovery thereof or of any part thereof . . . C

On Nov. 2, 1937, the commission issued plaints in the county court for the recovery of those arrears. The question that arises, and as to which the parties seek the opinion of the court, is whether, at the date when those plaints were issued, there was any reasonable prospect of the recovery of the tithe, the substantial point being whether the period of limitation had expired before the issue of those plaints. D

Under the Tithe Act, 1936, s. 20, there is certain machinery provided with regard to the recovery of arrears of tithe, and its object is to give to the tithe-payer who has fallen into arrear with his payments an opportunity of placing before the commission representations of a character specified in the section. Sect. 20 (3) and the immediately following subsections make provision for that. Sect. 20 (3) provides as follows : E

No legal proceedings for the recovery of arrears of a rentcharge shall be commenced or continued by the commission on or after the said Apr. 1, [the day on which the arrears vested in the commission], until one month after [the tithe-owner has by notice in writing served after that date given to the tithe-payer] and to the commission, particulars in writing in the prescribed form of the arrears which the tithe-owner claims to be recoverable from the tithe-payer. F

Sect. 20 (4) provides that the tithe-payer upon whom that notice is served may, within a month after service, or an extended period which the commission have power to grant, serve on the commission a notice requiring the matter of recovery to be referred to a committee. That committee is given power to take certain matters into consideration and to come to a decision. I need not go into the details of that more than to say that, where a tithe-payer serves such a notice, the commission G

is to refer the matter to the committee, and shall not commence or continue any legal proceedings for the recovery of the arrears until the matter has been disposed of by them. The effect, therefore, is that the commission are precluded from instituting legal proceedings for the recovery of arrears for a period beginning on Apr. 1, 1937, and ending either at the expiration of the month following the service of the notice or at the expiration of such extended period as may be required for the decision by the committee of the matters in question. In a case where the tithe-payer does not avail himself of the right to require a reference to the committee, the relevant period is, of course, the month. If he avails himself of that right, the period will be an extended one.

In the present case, the tithe-payers, when the notices were served upon them, did not avail themselves of the right to require reference to a committee, and, accordingly, for the purposes of the present case, the relevant period is the month. Pursuant to sect. 20 (3), the present appellants sent by post on Sept. 30, 1937, the notices referred to in that subsection, and, for the purposes of the argument of the present case, it is assumed that service took place on the following day—namely, Oct. 1—in due course of post. As I have said, the two years laid down by the Tithe Act, 1891, expired at midnight on Oct. 1-Oct. 2, and, therefore, apart from other considerations, at the date when they served the notices, the appellants still had the whole of the following day—namely, Oct. 1—in which to issue their plaints without infringing the provisions of the Act of 1891. The result, therefore, was that, between the actual moment of service (which, for the sake of argument, I will take to be 10 a.m.) and midnight on Oct. 1-Oct. 2, there were remaining 14 hours of the last day of the two-year period laid down by the Tithe Act, 1891. Sect. 20 (10) of the Act of 1936, after providing for the method of recovery of arrears vested in the commission, has this proviso :

Provided that : (a) the provisions of the Tithe Act, 1891, s. 10 (2) . . . shall have effect in relation to the recovery of arrears by the commission from a tithe-payer, so, however, that in reckoning the said period of two years time after the tithe-owner has served a notice for the purposes of subsect. (3) of this section on the tithe-payer, during which legal proceedings may not, by virtue of this section, be commenced or continued, shall be excluded.

The question at first sight appeared to be one of some difficulty, but, after the careful arguments on each side to which we have listened, we have come quite clearly to the conclusion that the judge's decision was right.

The appellants put their case in this way. They say that, when one is computing the period of two years (which, in the present case, as I have said, would have expired at midnight on Oct. 1-Oct. 2, 1937), one is to exclude from the computation of that period a period of time beginning with the actual moment at which the notice was served. They point out that the language used is "time after the tithe-owner has served a notice," and they say that in the present case the tithe-owner served the notice at 10 a.m. on Oct. 1, and that therefore that is

the beginning of the period of time mentioned. The time is further defined, however, as being a time during which legal proceedings may not be commenced or continued, and they say that the time during which legal proceedings may not be commenced or continued, with reference to which the notice in question is relevant, is the period of one month referred to in sect. 20 (3), beginning, on the facts of this case, at midnight of Oct. 1-Oct. 2. Then they proceed to say: "If you exclude that period, beginning with the actual moment of service, and ending at midnight on Nov. 1-Nov. 2, from the two-year period, what is left?" The answer is that there is left of the two-year period 14 hours. That is to say, the 14 hours which elapse between 10 a.m. on Oct. 1 and midnight of Oct. 1-Oct. 2 are to be added, so to speak, at the other end, which gives the commission 14 hours from midnight of Nov. 1-Nov. 2 in which to issue the writ, and any writ issued within those 14 hours is in time. Alternatively, they say that they had not 14 hours out of those 24 hours, but that they had the whole of Nov. 2 up to midnight of Nov. 2-Nov. 3.

With regard to this alternative contention, it is to be observed that the effect of giving that construction to the language used would be to extend the two-year period by 14 hours. We do not think that that is a construction which, upon any view, could be supported, because we can see in the language used no justification for extending the period in that way. The more attractive alternative, in one sense, so far as regards the literal meaning, or what might be thought to be the literal meaning, of the language used is the other, but it involves some very remarkable consequences. If that construction were right, it would be necessary in each case to ascertain precisely the moment of service of the notice, and it would be necessary in each case to ascertain precisely the moment of issue of the writ. It would be necessary to ascertain the former in order to fix, by reference to hours, the exact currency of the two-year period, and to ascertain how much, in the present case, of Nov. 2 was available for that purpose. It would be necessary to ascertain the moment of time when the writs were issued in order to ascertain whether the issue of the writs took place within the period so ascertained. Anything more inconvenient it is difficult to imagine, but, of course, that by itself is no ground whatever for placing upon the language of a statute a construction which does not accord with its true and reasonable meaning.

In our judgment, the fallacy which underlies the appellants' argument consists in a failure to give full effect to the circumstance which I am about to mention. The crucial words at the end of proviso (a) to sect. 20 (10) are referential. They are not dealing with some independent period beginning with the service of a notice, but are referring to something which has gone before, and that something which has gone before is to be found in subsect. (3). When subsect. (3) is properly analysed, certain points emerge. First, there is no prohibition against bringing

proceedings during the period after service of the notice as such. The prohibition is a prohibition extending over the period of time laid down in the subsection. That period of time begins on Apr. 1, 1937. It ends at a point of time which is to be ascertained by reference to the period of one month after service of the specified notice. In other words, the notice and the month are relevant under subsect. (3) only for the purpose of fixing the end of the period in subsect. (3) which begins on Apr. 1. That is what I mean by saying that the period between the service of the notice and the expiry of the month is not the subject-matter of some independent prohibition of its own. It is merely part of the machinery for fixing a date.

It is common ground that, upon the true construction of subsect. (3), the month after the service of the notice is to be calculated as from the midnight following the actual time of service. In the present case, the month is to be calculated as from midnight of Oct. 1-Oct. 2, service being assumed to have taken place at 10 a.m. on Oct. 1. That construction is in accordance with the general principle of construction of documents, including statutes, under which, unless the context otherwise requires, when a period is referred to as a period after the happening of an event, the day on which the event actually happens is excluded from computation. Of course, there may be circumstances in which, for the purpose of doing justice, the precise moment of service of a document, or precise moment of the occurrence of an event, may be a material and vital consideration, in which case it has to be ascertained, but the general principle which I have stated is well established, and is not disputed. The only object, therefore, of the service of the notice under subsect. (3) may be said to be to fix the relevant midnight for the commencement of the month mentioned in that subsection. Apart from that, it is of no importance, so far as the period is concerned, although, of course, its importance as being the thing which puts the tithe-payer in a position to take certain steps exists, but that is a different matter altogether. So far as the period is concerned, its only importance is to fix the period of the month.

There is one other matter in reference to the words in the proviso "time after the tithe-owner has served the notice" which I must mention, and it is this. As I have already pointed out, subsect. (3) provides for the period of one month. Subsects. (4) and (5) provide for cases where that period may be extended, and may be extended for an uncertain period. Accordingly, when the legislature, in subsect. (10) (a), finds itself compelled to refer to periods dealt with in the earlier subsections, it cannot simply say "the period of one month mentioned in subsect. (3)," which would have placed the present question beyond all doubt, but it is compelled to use a form of words which, as a matter of construction, will cover, not merely what I may call the basic period of one month, but also the extended period, if any such there be.

The two opposing constructions, I think, can be summed up very

shortly by taking two paraphrases of the words under discussion. I think that, after what I have said, the usefulness of these paraphrases for the purpose of bringing out the point will be apparent. It is said on behalf of the respondents that the phrase "time after the tithe-owner has served a notice for the purposes of subsect. (3) of this section on the tithe-payer, during which legal proceedings may not, by virtue of this section, be commenced or continued" means "that portion of the period beginning on Apr. 1, 1937, during which legal proceedings may not be commenced, which consists of the month mentioned in subsect. (3) or the extended period mentioned in subsects. (4) and (5)." That is one paraphrase, and, obviously, if that be the true meaning, the words "time after" in reference to the facts of the present case mean the same thing as do the words "one month after" in subsect. (3). The alternative paraphrase, while accepting down to a point the one which I have just stated, puts in this qualification: "that in reckoning the period of two years so much time as elapsed after the service of the notice shall not be reckoned." In other words, the words "time after" are to be construed as referring, not to the "month after" referred to in subsect. (3), but to the actual period of time which, in truth and in fact, according to the clock, begins to run at the moment of service. In our opinion, the former paraphrase accurately states the true meaning and effect of the words. Indeed, once it is appreciated that the words are referential, that they are a comprehensive formula for bringing into the machinery of this subsection a particular portion of the period during which proceedings specified in subsect. (3) are not permissible, and once it is borne in mind that the service of the notice under subsect. (3) has, as I have already said, no effect for the purpose of that provision save that of fixing the relevant month, the whole scheme of this section fits together, and we think that the true construction of the words, when the matter is really gone into and understood, is beyond question.

The alternative construction, as I have said, not merely leads to results of a highly anomalous and inconvenient description, but it does not appear to us to fit in with the scheme of this section and the language in which it is expressed. It really rests on a too literal attention to the words "after the tithe-owner has served," and on impressing upon those words a definite reference to the point of time of service. I have to point out that, even taking the words literally, that is by no means a necessary construction of them, because the month in question, beginning at midnight of Oct. 1-Oct. 2, is after the service which took place at 10 a.m. on Oct. 1. The appellants point out that the effect of this construction is, in one sense, to deprive them of 14 hours out of their two years, because they say that, whereas, apart from this legislation, they would have had up to midnight of Oct. 1-Oct. 2, they do not now get that period, but only a portion of it. That, in a sense, is true, but it is not a circumstance which would justify us in giving to what we conceive to be the clear intent of the language used a construction

which it does not fairly bear. It is fair to point out—and, indeed, it was not disputed—that the Act does quite clearly in one case deprive the tithe-owner of a day out of his two years. The case in question is that of tithes which fell due on Apr. 1, 1935. In that case, no notice can be served until after Apr. 1. The prohibition against bringing actions begins on, and includes, Apr. 1 itself, and the result of that position is that, unless proceedings had been begun by the tithe-owner himself on Mar. 31—which, of course, is the day before the arrears vested in the commission—that tithe would be irrecoverable, notwithstanding the fact that the two years had not elapsed by one day. It is not perhaps surprising that in trying to fit in periods in this way there should be some slight lack of coincidence in respect of a day, or part of a day. In one case, it clearly happens. I myself find nothing in the fact that, in the present case, it would appear to happen in respect of those odd hours which strikes me as being so surprisingly unjust or so little to be expected as to justify departing in the least from the *prima facie*, and, in our opinion, clear, meaning of the statute. In the result, the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors: *The Solicitor, Queen Anne's Bounty* (for the appellants);
Solicitor to the Minister of Agriculture and Fisheries (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

MARTHEWS v. MARTHEWS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), June 14, October 20, November 8, 1938.]

Divorce—Desertion—Previous proceedings for judicial separation abandoned—Whether period of desertion continues to run—Matrimonial Causes Act, 1937 (c. 57), s. 6.

The petitioner sought a divorce upon the ground that his wife had deserted him for a period of at least 3 years immediately preceding the presentation of the petition. It was found that the wife had deserted the petitioner in Oct., 1934. The petitioner had in Feb., 1937, presented a petition for judicial separation. An answer to that petition was filed, but, no further step having been taken, the petition was dismissed at the instance of the petitioner on Jan. 26, 1938. The present proceedings were commenced on Jan. 27, 1938:—

Held: the presentation of the petition for judicial separation precluded the petitioner from successfully pleading that the period for desertion was running during the time that that suit was being maintained, and the present petition must, therefore, be dismissed.

[EDITORIAL NOTE.] The Matrimonial Causes Act, 1937, s. 6 (3), provides that, where parties have been granted a decree of judicial separation, then desertion for a period of 3 years immediately preceding the institution of the proceedings for judicial separation may be treated as a period immediately preceding the presentation of the petition for divorce. It was decided in *Johnson v. Johnson*, [1938] 3 All E.R. 765, that it was immaterial for this purpose that the proceedings for judicial separation are not prosecuted to a conclusion, but are withdrawn before

decree. In that case, there was, of course, desertion for more than 3 years before the institution of the proceedings for judicial separation. In the present case, it will be noted that the period of 3 years had not elapsed before the commencement of the earlier proceedings, and, in those circumstances, it is held that the necessary period of desertion is not established.

AS TO EFFECT OF PETITION OR JUSTICES' ORDER IN DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 658, 659, paras. 968, 969; and FOR CASES, see A DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to :

- (1) *Stevenson v. Stevenson*, [1911] P. 191; 27 Digest 320, 2986; 80 L.J.P. 137; 105 L.T. 183.
- (2) *Herod v. Herod*, [1938] 3 All E.R. 722; Digest Supp. B
- (3) *Wickins v. Wickins*, [1918] P. 265; 27 Digest 348, 3292; 119 L.T. 268.

UNDEFENDED PETITION by the husband for dissolution of marriage on the ground of desertion for a period of three years immediately preceding the presentation of the petition. The only question that arose upon this petition was whether desertion continued to run after the filing by the petitioner of a petition for judicial separation which was not proceeded with. C

R. J. A. Temple for the petitioner.

LANGTON, J. : This case came before me in the first instance on June 14, 1938. The petitioner, Mr. Eric Walter Marthews, a dental surgeon, seeks a divorce from his wife, Linda Rose Marthews, on the ground that his wife has deserted him without cause for a period of at least three years immediately preceding the presentation of the petition. E The petition was presented upon Jan. 27, 1938. At the hearing of the matter upon June 14, the petitioner proved to be a nervous and confused witness, and, even in the able hands of Mr. Turner, who then represented him, he did not succeed in convincing me that desertion had really taken place. There was also looming in the background a legal F difficulty arising out of the presentation of a petition for judicial separation in Feb., 1937, before a period of three years had elapsed from the date of the alleged desertion. In the circumstances, Mr. Turner wisely elected to ask for an adjournment, in the hope that the facts as to desertion might be further elucidated and the legal difficulty to which G I have referred further considered. On Oct. 20, the matter came before me again, when the petitioner was represented by Mr. Temple, and, with the help of some correspondence which had been unearthed since the first hearing, the petitioner succeeded in convincing me entirely as to the fact of his wife's desertion in Oct., 1934. Since the petition in H the present case was presented on Jan. 27, 1938, I should accordingly have had no difficulty in finding desertion proved for the period required under the Matrimonial Causes Act, 1937, s. 2 (b), were it not for the legal difficulty created by the presentation of the petition for judicial separation in Feb., 1937.

This case accordingly raises under the new Act precisely the same point as that which was dealt with by the Court of Appeal under the Act of 1857 in *Stevenson v. Stevenson* (1). After a considerable and difficult inquiry, it became quite clear that Mr. Marthews in this case was the victim of some very foolish advice on the part of a solicitor's managing clerk in the employ of a solicitor who was at that time, but is no longer, acting as his legal adviser. Mr. Marthews, whose wife had left him and refused to return, consulted this managing clerk as to how he might best act to bring his wife to reason or to obtain a divorce. For motives that remain entirely obscure to me, the managing clerk suggested that his best course would be to put on the file a petition for judicial separation as the best means of what he described as "bringing matters to a head." It will be remembered that at that time the Matrimonial Causes Act, 1937, was not in force, and not even certain of being passed into law. In these circumstances, what matters could thus be brought to a head, or to any satisfactory conclusion, by a petition for judicial separation it is beyond my powers to imagine. Nevertheless, the step was taken, and Mrs. Marthews put in an answer to the effect that a deed of separation, dated July 18, 1933, was still subsisting. In truth and in fact, this deed of separation, as Mrs. Marthews well knew, had come to an end upon a resumption of cohabitation, and at no time, either before or after the suit for judicial separation was commenced, has Mrs. Marthews had sufficient confidence in this answer to make any claim for the support to which she would have been entitled under the deed. Indeed, so tenuous is her belief in this that she never troubled to re-assert it when the present petition for divorce was put forward in Jan., 1938. No further step was ever taken by either party in the petition for judicial separation, and the petition itself was withdrawn by Mr. Marthews upon advice, and was dismissed at his instance by this court on Jan. 26, 1938.

No one who has the interests of justice at heart can see with equanimity a litigant being penalised as the result of bad legal advice. I am therefore not ashamed to confess that I have aided and abetted Mr. Temple in his praiseworthy effort to find a loophole out of the legal impasse into which Mr. Marthews has forced himself.

In *Stevenson v. Stevenson* (1), a strong Court of Appeal, presided over by SIR H. H. COZENS-HARDY, M.R., laid down that the institution of a suit for judicial separation precluded the petitioner from successfully pleading that the period for desertion was running during the time that the suit was being maintained. The suit in that case was a wife's petition for divorce on the ground of the husband's adultery and desertion. It was only necessary at that time to prove, so far as desertion was concerned, a desertion of two years. In fact, at the time when the divorce petition was presented, the desertion had run for upwards of three years, but unfortunately the period of three years was interrupted by an earlier petition for judicial separation which had been presented halfway

through the period of three years, on the ground of the husband's adultery. SIR H. H. COZENS-HARDY, M.R., in giving the judgment of the Court of Appeal, affirming the decision of the trial judge, BARGRAVE DEANE, J., used the following language at p. 194 :

In my opinion this decision was perfectly right. At the date of the petition there had not been desertion for two years, such as is required by the statute. The desertion had lasted 18 months only. The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away. When the supplemental petition was filed there had not been desertion for two years without excuse. A

In the course of his argument, Mr. Temple put four points, three of which seem to me to be worthy of consideration. His first point, which appeared to me to be quite unarguable, was really founded upon the headnote of *Stevenson v. Stevenson* (1). It had no foundation in, and received no support from, anything to be found in the judgments delivered in the case. Because no further step was taken after the wife's answer had been delivered in the suit for judicial separation, Mr. Temple attempted to argue that the suit had not been "filed and prosecuted." The short answer to this contention, if any be necessary, is to be found at once in the passage which I have quoted above from the judgment of SIR H. H. COZENS-HARDY, M.R. So long as that petition remained on the file, Mr. Marthews was praying the court to require his wife to keep away. The points of substance were (i) that the existence of such a suit was evidence only of a desire that the wife should keep away, and could be rebutted by the other evidence in the case; (ii) that, whereas the court in *Stevenson v. Stevenson* (1) were dealing with the Act of 1857, where the words employed are "without excuse," the words in the Act of 1937 are "without cause"; (iii) that a distinction can and ought to be founded upon what SIR BOYD MERRIMAN, P., in the recent case of *Herod v. Herod* (2) has called a "subjective" rather than an "objective" construction of "desertion without cause." B C D E F

I have given all these points the closest and most partial consideration, since I have been most anxious to assist Mr. Marthews out of his difficulty if I could feel that it was right and permissible to do so. I am sadly afraid that the more closely they are examined the more flimsy they become. As regards the first point, it is true that BARGRAVE DEANE, J., in his judgment said, at p. 192, that the prayer for judicial separation was : G

... the strongest piece of evidence you can have that she herself wished the state of cohabitation to be put an end to . . .

Also, I entirely agree with Mr. Temple that the petitioner in the present case did not read, and certainly did not intend, the meaning of the words contained in the prayer. If, therefore, the prayer could be treated as evidence only, there is certainly strong evidence in the present case to rebut the effect of the prayer. On the other hand, it is perfectly clear that SIR H. H. COZENS-HARDY, M.R., does not put the matter upon H

evidence at all. He is laying down as a matter of law that no one can invoke the assistance of the court, with all that such assistance connotes, during the pendency of the petition and at the same time claim that during the period that the assistance is being invoked the other spouse is guilty of desertion. When one bears in mind that, as soon as petitions

A of this class, for either divorce or judicial separation, are presented to the court, there is a temporary, and quite considerable, change in the duties appertaining to the marriage state, there is nothing surprising in the result that such petitions should be held to create an interregnum, at least, in the running of the period of desertion.

B That this conception was not absent from the minds of those responsible for the Matrimonial Causes Act, 1937, is, I think, clear from the wording of sect. 6 (3), which provides as follows :

C For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Acts having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

It will be observed that, in order to obtain the advantage of being able to count the period of desertion which has preceded the institution of proceedings for judicial separation, it is there made necessary that the parties shall not have resumed cohabitation, and that the decree shall have been continuously in force since the granting thereof. It is difficult to believe that the legislature in considering this matter were not attempting to confirm, rather than to over-ride, the principle laid down

D

E in *Stevenson v. Stevenson* (1).

The point made upon the words "cause" and "excuse" is quite obviously untenable when one finds the two words both used in the same signification in the Act of 1857. (See also the decision in *Wickins v. Wickins* (3) at p. 270.)

F Finally, the attractive point argued upon the analogy of the judgment of SIR BOYD MERRIMAN, P., in *Herod v. Herod* (2), that the words "desertion without cause" must be considered as used in a subjective sense, can have no force in the face of the understanding of the judgment of SIR H. H. COZENS-HARDY, M.R., in *Stevenson v. Stevenson* (1) which

G I have here expounded. To my regret, therefore, I must hold that this case is ruled by the judgment of the Court of Appeal in *Stevenson v. Stevenson* (1), and the petition fails.

Petition dismissed.

Solicitors : J. D. Langton & Passmore (for the petitioner).

H [Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

WALTON v. WALTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
October 20, 21, November 10, 1938.]

*Divorce—Desertion—Previous proceedings for divorce within 3 years of petition—
Whether petition barred—Staying petition by refusal to grant certificate
that pleadings in order.*

A
A petition for divorce upon the ground of desertion for a period of 3 years immediately preceding the presentation of the petition disclosed a previous petition for divorce founded on adultery, filed 15 months earlier and subsequently dismissed on the petitioner's application. The registrar refused to grant a certificate that the pleadings were in order, on the ground that the earlier petition necessarily put an end to the B
desertion:—

HELD: the mere presence of the petition on the file, whether it was a petition for judicial separation or divorce, was a bar to the present proceedings, and the registrar was right in dealing with it as a matter of pleading and stopping these proceedings *in limine*.

[EDITORIAL NOTE. It was here argued that all the facts of the case would C
have to be considered before it could be decided that there was no case of desertion; but the court has decided that the pleadings showed that there was no ground for any relief, and has allowed the proceedings to be stayed.]

AS TO EFFECT OF PETITION ON DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 658, 659, paras. 968, 969; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.] D

Case referred to:

(1) *Marthews v. Marthews*, [1938] 4 All E.R. 377; Digest Supp.

DIVORCE SUMMONS adjourned into court. The petition, being one for divorce, alleged desertion for a period of 3 years next preceding June, 1938, but also disclosed a former petition for divorce, founded on adultery, E
presented in Mar., 1937. The registrar had refused to grant a certificate that the pleadings were in order, on the ground that they in fact disclosed that there had not been desertion for the period required by the statute. L. B. Schapiro for the petitioner.

F
HENN COLLINS, J.: In this case, the refusal of the registrar to grant his certificate that the pleadings were in order was grounded on the fact that the petition alleging desertion for three years next preceding June, 1938, when the present petition was filed, disclosed that in Mar., 1937, the petitioner had filed a petition founded on adultery, G
which had been dismissed on May 25, 1938, on the petitioner's application. The point was ably argued on behalf of the petitioner by Mr. Schapiro. He contended that the filing of the petition in Mar., 1937, had not necessarily put an end to the desertion, but that the question whether or not it did so was to be decided upon the facts of the case, and not as H
a matter of law, and that therefore the suit should not be stopped *in limine* by the refusal of a certificate. Since the matter was argued before me, judgment has been given by LANGTON, J., in *Marthews v. Marthews* (1). I can find no material distinction between that case and this. Whether the intervening petition is for judicial separation,

as in *Marthews v. Marthews* (1), or for divorce, as in this case, its effect is to suspend the legal obligation upon the spouses of living together. There can in law be no desertion so long as that legal obligation is in abeyance.

A This result flows merely from the presence of a petition upon the file, and not from, nor from the absence of, any reactions it may have had upon the alleged deserter, nor would it be altered by any proof of such reactions, or by the absence of them. In other words, the consequence flows as a matter of law. In those circumstances, the registrar was right in dealing with it as a matter of pleading, and the appeal must be dismissed.

Appeal dismissed.

Solicitors : *Joynton-Hicks & Co.* (for the petitioner).

[*Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.*]

SMITH HOGG & CO., LTD. v. BLACK SEA & BALTIC
GENERAL INSURANCE CO., LTD.

D [KING'S BENCH DIVISION (Branson, J.), November 2, 3, 4, 7, 8, 1938.]

Shipping—Charterparty—Unseaworthiness—Due diligence—Loss due to act, neglect or default of the master—Ship unseaworthy at commencement of voyage—Loss due to unskilful loading of bunkers during voyage—Claim for general average.

E The plaintiffs were the owners of a ship chartered to go to Soroka and load timber and carry it to Garston. The charterparty provided that the shipowner should not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part, and that the shipowner should not be responsible for loss or damage arising or resulting from any act, neglect or default of the master, mariner, pilot or servants of the shipowner in the navigation or management of the ship. General average was to be settled in London according to the York-Antwerp Rules, 1924, in accordance with English law. While the ship was loading at Soroka, she suddenly took a list of 5° to port. The master then stopped loading and proceeded upon his voyage. Before arrival at his port of destination, he ran short of bunkers, and put in to Stornoway to take in some extra coal. When 16 tons of coal had been taken in, the ship heeled over, and, in order to save her from sinking, she was beached, with the result that a good deal of the cargo was lost and some of it was damaged. It was found as a fact that the ship was unseaworthy upon leaving Soroka, but the experts agreed that the ship could have been bunkered at Stornoway in such a manner as to bring her back to the upright and to have allowed her to proceed quite safely to Garston and deliver her cargo. The shipowners claimed general average contribution from those interested in the cargo :—

H HELD : there was here no *nexus* between the unseaworthiness of the ship at Soroka and the loss of the cargo, which was due to the unskilful way in which the bunkers were shipped at Stornoway. The shipowners were not responsible for the loss, since the circumstances came within the exception of the act, neglect or default of the master. The shipowners were, therefore, entitled to general average contribution from those interested in the cargo.

EDITORIAL NOTE. The question here is whether the loss of cargo was due to the original unseaworthiness of the ship or whether it was due to the unskilful way in which the coal was taken on board during the course of the voyage. After a careful consideration of the expert evidence, the judge decided that the loss was not to be ascribed to the unseaworthiness, and that, therefore, on the terms of the charterparty, the shipowners were entitled to claim general average contribution from those interested in the cargo. A

AS TO GENERAL AVERAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 593-598, paras. 751-755; and FOR CASES, see DIGEST, Vol. 41, pp. 593-598, Nos. 4169-4241.]

Case referred to:

- (1) *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538; Digest Supp.; 103 L.J.P.C. 166; 151 L.T. 549. B

ACTION by shipowners for general average contribution from those interested in the cargo, and counterclaim by cargo-owners for the loss of, and damage to, cargo. The facts and arguments are fully set out in the judgment. C

Sir Robert Aske, K.C., and *Cyril Miller* for the plaintiffs.

G. St.C. Pilcher, K.C., and *Hon. T. G. Roche* for the defendants.

BRANSON, J.. The plaintiffs in this case are the owners of the steamer *Lilburn*, which was chartered by a charterparty dated July 24, 1935, to go to Soroka in the White Sea and there load a cargo of timber and carry it to Garston. The ship went to Soroka and loaded her cargo, and she sailed from there on Sept. 5, 1935. She proceeded towards Garston until Sept. 18, when, owing to the fact that she had practically exhausted her bunkers, she put into Stornoway to take in some more coal. When she had taken in some 16 tons of coal, she heeled over, and, in order to save her from sinking, on the next day, Sept. 19, she was beached at Stornoway, and a good deal of her cargo was lost, and some of it was damaged. This action is brought by the owners in order to recover general average contribution from those interested in the cargo. The charterers were the Russian organisation known as Exportles Petrosavodsk, and, when the disaster had taken place, an average bond was given by the present defendants. It was also arranged, in order to save complications, that the present defendants should be allowed to counterclaim, as the persons interested in the cargo, for loss of cargo occasioned by the disaster. No question of figures arises for me to determine, but the question that I have to decide is whether the plaintiffs, the owners of the ship, are entitled to a general average contribution from the owners of the cargo or those interested in the cargo, or whether, on the other hand, the disaster happened in such circumstances as will prevent the owners from claiming a general average contribution, but will, on the other hand, give rise to a claim by the cargo-owners for the damage to, and loss of, cargo. The material clauses of the charterparty are really only two. Clause 12 provides as follows: D

The shipowner shall not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the ship- E

F
G
H

owner to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. The shipowner shall not be responsible for loss or damage arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the shipowner in the navigation or in the management of the ship.

Clause 22 provides as follows :

A General average, if any, shall be settled in London according to the York-Antwerp Rules, 1924, in accordance with English law.

B That being the state of affairs, the first question which arises for decision is whether the ship was, as the defendants allege, unseaworthy when she left the port of Soroka. That is a question of fact, and depends upon the evidence which was given before me and which is to be found in the documents of the case. I have come to the conclusion that the ship was unseaworthy when she left the port of Soroka, and the reasons which have brought me to this conclusion may be quite shortly stated in the following way. It appears to be undisputed that, when the ship C finished loading, she had a list of 5° to port. The evidence of the mate, Busby, was that that list came to the ship during the loading of the last two or three slings of cargo. It appears also that at the same time the master stopped loading while he still had, I think it was, nine standards or more of cargo which he was shutting out of the ship.

D With regard to the 5° list, it appears from the expert evidence that that might have come about either by unsymmetrical loading of cargo or by reason of the ship having been so loaded as to have acquired a negative metacentric height, and so have become unable to float upright. I think that the evidence of the mate that this list occurred fairly suddenly E during the loading of the last two or three slings of cargo points almost conclusively to the fact that it was due to loss of metacentric height, and not to unsymmetrical loading of cargo. A list which was occasioned by the latter cause would come gradually, and would not come almost in a few minutes, as it must have if the evidence of the mate was correct. F I am also led to the same conclusion by consideration of the captain's evidence. There is no doubt that he stopped the further loading of the cargo when there were only a very few standards—nine standards out of the total—yet to come on board. The reason which he gave for stopping the loading at that point was so ridiculous that I think it must G have concealed the true reason. The captain said that he stopped it because it was getting dark and because a Russian stevedore had been injured. There is no entry of the sort in the log, and it seems to me to be an absurd excuse for a ship's master to give. Another thing which makes me sceptical as to the captain's veracity with regard to what H took place at the sailing of the ship is his story that the last part of this cargo was loaded by the derricks being guyed almost amidships and the cargo dragged and bumped up the ship's side and bumped across the deck cargo already taken on board the ship and stacked on deck.

It seems to me to be an almost impossible story to believe, and no reason is given for loading in such an extraordinary way. If it were true, it

would seem to indicate that the ship was so tender that the master was afraid to let his derricks plumb the barges from which he was shifting cargo in case the extra leverage caused by guying them outboard in that way should disclose the instability of his ship. The story is thus a very odd one. If it is not true, one wonders why it was told. If it is true, it would seem to indicate a distrust of the stability of the ship on the part of the captain which negatives the rest of his evidence that he saw nothing in the behaviour of the ship to lead him to suppose that she was in any way unstable. The same conclusion follows from a perusal of the log. The history of the voyage as given in the log is a very ordinary history, and, so far as weather is concerned, it is some days before the log records any wind of a force as great as 7, and no greater force is logged throughout the voyage. The mate, who was asked about the voyage, said that the weather was just what one would expect in those waters at that time of the year. Having, then, met no exceptional weather—no weather which the ship, if seaworthy, ought not to have been perfectly well able to meet without any damage or any difficulty—this ship arrived at Stornoway with a list of 15° to starboard even after the forepeak had been pumped out in order to give her greater stability. It is said that 15° is nothing for a timber ship, and I am perfectly prepared to assume that many timber ships have arrived at their port of destination with a list of as much as 15°. Nevertheless, ships are differently constructed, differently laden, and have different amounts of bunkers on board, and because many ships have come into port with a list of 15° and not been unstable does not in the least show that 15° in this ship was not a dangerous amount of inclination, and did not show a dangerous lack of stability in the ship. Indeed, one sees that, after the forepeak had been pumped out and the ship tied up alongside the coaling-hulk, it required no more than 16 tons of coal put on board this ship to cause her to come up, from some 15° of heeling, to the vertical, and then to fall over on to the other side. It is said that it was all due to the loading of coal, which the chief engineer and the captain said in evidence was loaded either amidships or slightly upon the port side. I notice in the last entry of the log book, to which I called attention yesterday, that the statement is, "After taking about 16 tons of coal into port bunker," which does not agree with the statement made by the captain and the chief engineer before me—namely, that by an arrangement of planks they were able to ensure that the coal should run into the midships bunker or on to the starboard side. However, there we have a fact which, it seems to me, speaks for itself. The ship was there in Stornoway in such a tender and unstable state that she could not put on board 16 tons of bunkers in a very ordinary way without going over on to her beam ends. For these reasons, I have come to the conclusion that, when she left Soroka, the ship was not fit to face the ordinary perils of the sea upon her intended voyage from the White Sea to Garston.

The next question which then arises is whether or not there was due diligence displayed by the owners or the master in order to make the ship seaworthy. A point was made upon the construction of cl. 7 as to where the onus lay upon this matter of due diligence. I do not regard it as material to my judgment, but, as the point has been raised, I think that it is right that I should express my opinion about it. In my opinion, once unseaworthiness is established by the cargo-owners, the onus of showing that there was no lack of due diligence to try and make her seaworthy would lie upon the ship. I think that that is the construction of the words used, and it agrees with the general rule in the matter—namely, that, when one is considering upon whom lies the onus on a particular point, one should ask oneself who has to prove the affirmative case, because he who is affirming a state of affairs can prove it, whereas proof of a negative is always a very difficult, and sometimes a quite impossible, matter. I notice that, in the section of the Carriage of Goods by Sea Act where the matter is dealt with, the onus is expressly put upon the carrier or the person claiming the exemption, which in this case would be the shipowners. Sir Robert Aske used that as an argument for saying that, in the absence of any such express provision, the onus would be upon the other party. I do not follow that, and I see no reason why the onus in this clause of the charterparty should not lie, as it does under the Act, upon the person who is saying: "Notwithstanding the fact that my ship is unseaworthy, I used due diligence to try to make it seaworthy." As I have already said, in the present case the question of onus is immaterial, because it is perfectly plain here that the owners did nothing. They did not bother to give their master any instructions to provide for the stability of the ship. They did not understand anything about what one of them calls in one of his letters "this metacentric business," which is something quite new to him, apparently, although he has been a shipowner for some forty years. The plaintiffs left everything to the master, who was quite inexperienced in the matter of carrying wood cargoes in this ship. He had carried only one, or, at the most, two, before, and neither of them was of the same weight or quantity as was the cargo carried in the present case. Thus it is plain that the owners used no due diligence at all in this matter of seeing that the ship was not unseaworthy by reason of the way in which the ship had been loaded. Nor did the master. The master was a very unsatisfactory witness, and I found it difficult to believe very much of what he said. When he was cross-examined upon this question of stability, he began by saying that he shut out the remaining nine standards or so because he was annoyed at the careless way the stevedores were loading, and his mind was affected by the injury to the man, because he thought they were using the derrick in such a way that they might injure the ship. Then he finished up by saying: "I do not really remember why I shut out the last nine standards." Although it is true that it is a year or two since the matter arose, I ask myself whether

a master, whose ship had gone through what this ship went through at Stornoway, could really not remember why he shut out the last nine standards of cargo when the ship was being loaded to go upon that voyage. Then he was asked about the vessel swinging from side to side, which is, of course, an indication that the vessel is tender, and has lost her metacentric height, and will be, therefore, in an unstable condition as long as she remains upright. He said : A

I was looking for the vessel's swing from side to side. I would say she did not. She was not.

Then he said :

I cannot remember. If she had been, it would show that she had no metacentric height. B

Then he said :

I knew I must burn that weight of coal and become unstable if the metacentric height was neutral at the start.

I do not want to take up time by reading more of his evidence, but the net result of it all is that, in my view, the master either did not know or did not care. He knew he had got a ship which was loaded up with timber to such an extent that she could not sink, and whether she crawled in on her beam ends or whether she had to be salvaged by being towed in does not seem to have been a matter to which he paid very much attention. The result is that I find that no due diligence was used, and, therefore, that there was a want of due diligence in both the owners and the master of this ship. The result of that is that, if the unseaworthiness from which I have held the ship to have suffered when she was leaving Soroka was the cause of the loss that occurred at Stornoway, then the plaintiffs cannot recover for their general average contribution, and the defendants are entitled to recover for the loss of their cargo. The difficulty that I have in arriving at the conclusion that the unseaworthiness was the cause of the loss arises from what happened at Stornoway. If nothing which anybody could have done when the ship had got to Stornoway could have enabled that ship to have sufficient bunkers put on board to continue her voyage to Garston, then I think that the *nexus* between the unseaworthiness at Soroka and the accident at Stornoway would have been complete. However, neither side has been able to say that this ship could not have been bunkered at Stornoway, and bunkered in such a manner as to have brought her back to the upright and to have allowed her to proceed quite safely and deliver the cargo at Garston. Both the experts agree that this could have been done. True, they do not see quite eye to eye as to the manner in which they would have performed the operation, but that sufficient coal to take the ship to Garston could have been put on board the *Lilburn* was admitted by both Dr. Telfer and Mr. Flannery. That being so, how can it be said that the fact that she sailed unseaworthy from Soroka caused the disaster which happened at Stornoway? Mr. Pilcher cited to me *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers,* C D E F G H

Ltd. (1), where a somewhat similar occurrence took place, and the Judicial Committee followed the findings of fact of the two courts below and held that the unseaworthiness with which the voyage had begun in that case was really the cause of the loss which happened. I have considered that case, but it seems to me that, for the reason given by Sir Robert Aske in his argument, it really does not touch the position of the present case, because there the shifting could not in any way be remedied during the voyage, and the ship was unseaworthy because she had holds in which there was grain which was liable to shift because she had no shifting boards, and the captain was afraid to steer the proper course which he should have taken lest the putting of the ship into the trough of the sea, which steering the proper course entailed, might have shifted his cargo and caused disaster to the ship. There you have the *nexus* between the unseaworthiness and the disaster which, to my mind, is absent here. I think that here my decision must be that, in spite of the fact that the ship was unseaworthy when she left Soroka, and in spite of the fact that no due diligence was used by those responsible for the ship, because the accident took place, not by reason of the unseaworthiness of the ship, but by reason of acts of the master, which were wrong in the circumstances, the plaintiffs are entitled to succeed in their claim by reason of the exception in cl. 12: "act, neglect or default of the master." Similarly, the counterclaim must fail.

Judgment for the plaintiffs on the claim. Counterclaim dismissed.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Temperley, Tilly & Hayward*, West Hartlepool (for the plaintiffs); *Ince, Roscoe, Wilson & Glover* (for the defendants).

[*Reported by MAURICE SHARE, Esq., Barrister-at-Law.*]

CAXTON PUBLISHING CO., LTD. v. SUTHERLAND PUBLISHING CO., LTD.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Roche and Lord Porter), **June 20, 21, 23, 24, 28, 29, November 17, 1938.**]

Copyright—Infringement—Damages—Damages for infringement and conversion—Whether cumulative or alternative—Copyright Act, 1911 (c. 46), ss. 6, 7.

Copyright—Infringement—Conversion—Limitation of action—Assessment of damages for conversion—Copyright Act, 1911 (c. 46), ss. 6, 7, 10, 14, 35.

In an action for an alleged infringement of the plaintiffs' copyright in a certain publication, the plaintiffs claimed, *inter alia*, an inquiry as to (i) damages suffered by reason of the infringement, and (ii) damages for conversion. The defendants admitted the infringement, and submitted to an inquiry as to what damages the plaintiffs had suffered, but contended that the remedies given by the Copyright Act, 1911, ss. 6, 7, were alternative, and not cumulative, and that the plaintiffs must elect their remedy. The defendants also relied upon the Copy-

right Act, 1911, s. 10, and the Statute of Limitations in answer to the plaintiffs' claim:—

HELD: (i) on the proper construction of the Copyright Act, 1911, the remedies were not in law mutually exclusive, and the plaintiffs were entitled to recover damages under both heads.

(ii) the triennial limitation imposed by sect. 10 of the Act of 1911 applies to a claim for damages for conversion under sect. 7.

(iii) the act of conversion was the act of binding up the infringing sheets with the innocent sheets so as to form the volumes produced.

(iv) the damages should be assessed at £150, being the sum which the Court of Appeal would have awarded on the footing that the triennial limitation applied.

Order of Court of Appeal dated Feb. 7, 1936 ([1936] 1 All E.R. 177) *affirmed*.

Order of Court of Appeal dated Nov. 15, 1937 ([1937] 4 All E.R. 405) *discharged, and judgment of CROSSMAN, J.* ([1937] 1 All E.R. 338) *restored*.

[EDITORIAL NOTE.] The present appeals finally decide a number of questions relating to infringement of copyright, which have been litigated for the past few years. The first question is whether the damages for infringement and those for conversion are mutually exclusive or whether they are cumulative, and it is herein decided that they are cumulative—that is, that a plaintiff is entitled to recover damages under both heads. The second question is what limitation of time applies to a claim for damages for conversion. It has always been agreed that the three-years' limitation imposed by the Copyright Act, 1911, s. 10, applies to an action for infringement, but it was disputed whether the same limitation applied when the plaintiff claimed damages for conversion, as he was entitled to do under sect. 7 of the Act. The House of Lords have now decided that the period of limitation is the same in each case. The third question arises in this way. The measure of damages for conversion is the value of the thing converted at the date of conversion. It becomes necessary, therefore, to fix the date of the conversion—that is, in other words, to determine the particular act which amounts to conversion. The circumstances in which this question has to be determined here are those that arise where only a small portion of a book infringes the copyright of the plaintiffs. In this matter, their Lordships have held that the act of conversion was the act of binding the infringing sheets with the innocent sheets, and so making the volumes which were sold. The determination of the act of conversion is also material on the question of limitation of time, since it will fix the moment at which the period of 3 years will commence.

AS TO DAMAGES FOR INFRINGEMENT OF COPYRIGHT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 591-593, paras. 917-919; and FOR CASES, see DIGEST, Vol. 13, pp. 219, 220, Nos. 565-573.]

Cases referred to:

- (1) *Lancashire & Yorkshire Ry. Co., London & North Western Ry. Co. & Graeser, Ltd. v. MacNicol* (1918), 88 L.J.K.B. 601; 21 Digest 300, 1080; 118 L.T. 596.
- (2) *Mediana (Owners) v. Comet (Owners, etc.), The Mediana*, [1900] A.C. 113; 17 Digest 79, 9; 69 L.J.P. 35; 82 L.T. 95.
- (3) *Reid v. Fairbanks* (1853), 13 C. B. 692; 43 Digest 509, 484; 21 L.T.O.S. 166; *sub nom. Reid v. Fairbanks*, 22 L.J.C.P. 206.
- (4) *Burmah Trading Corpn. v. Mirza Mahomed Ally Sherazee & Burmah Co., Ltd.* (1878), L.R. 5 Ind. App. 130; Digest Supp.
- (5) *Ash v. Dickie*, [1936] Ch. 655; [1936] 2 All E.R. 71; Digest Supp.; 105 L.J.Ch. 337; 154 L.T. 641.
- (6) *De Vitre v. Betts* (1873), L.R. 6 H.L. 319; 28 Digest 514, 1191; 42 L.J.Ch. 841; *varying S.C. sub nom. Betts v. Neilson, Betts v. De Vitre* (1868), 3 Ch. App. 429; *sub nom. Betts v. De Vitre* (1865), 34 L.J.Ch. 289.

- (7) *Neilson v. Betts* (1870), L.R. 5 H.L. 1; 28 Digest 514, 1190; 40 L.J.Ch. 317; varying S.C. sub nom. *Betts v. Neilson*, *Betts v. De Vitre* (1868), 3 Ch. App. 429.
- (8) *Smith v. Baker* (1873), L.R. 8 C.P. 350; 43 Digest 536, 711; 42 L.J.C.P. 155; 28 L.T. 637.
- (9) *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] Ch. 489; [1936] 2 All E.R. 1496; Digest Supp.; 106 L.J.Ch. 303; 155 L.T. 46.
- (10) *Oakley v. Lyster*, [1931] 1 K.B. 148; Digest Supp.; 100 L.J.K.B. 177; 144 L.T. 363.
- (11) *Greening v. Wilkinson* (1825), 1 C. & P. 625; 43 Digest 521, 587.
- (12) *John Lane, Bodley Head, Ltd. v. Associated Newspapers, Ltd.*, [1936] 1 K.B. 715; [1936] 1 All E.R. 379; Digest Supp.; 105 L.J.K.B. 326; 154 L.T. 403.

CONSOLIDATED APPEALS from two orders of the Court of Appeal dated respectively Feb. 7, 1936, and Nov. 15, 1937. By the first order, dated Feb. 7, 1936, an order of FARWELL, J., dated Nov. 6, 1935, was reversed, and it was declared that the respondents, who were the plaintiffs in the action, were entitled to damages both for infringement of copyright and for conversion. By the second order, dated Nov. 15, 1937, an order of CROSSMAN, J., dated Jan. 27, 1937, was varied, and it was ordered that the appellants should pay the respondents the sum of £494 as damages for conversion, instead of the sum of £150 as ordered by CROSSMAN, J., together with the costs of the action and of the appeal. The proceedings in the Court of Appeal are reported [1936] 1 All E. R. 177 and [1937] 4 All E.R. 405. The facts and the arguments are fully set out in the opinions of their Lordships.

Hon. Sir Stafford Cripps, K.C., and *E. J. Macgillivray* for the appellants.

K. E. Shelley, K.C., *Charles W. Measor* and *Guy Aldous* for the respondents.

LORD THANKERTON: My Lords, I have had the privilege of considering the opinion of my noble and learned friend LORD PORTER, with which I find myself in agreement, and I only desire to add some further observations on two of the four contentions of the plaintiff-appellants—namely, as to the applicability of the limitation provision of sect. 10 to proceedings under sect. 7, and as to the proper measure of damages. On the question of limitation, I have felt less difficulty than my noble and learned friend, and I agree with the view expressed by my noble and learned friend LORD RUSSELL OF KILLOWEN, whose opinion I have also been privileged to consider, with regard to the proper construction of sect. 14. The question depends on whether proceedings under sect. 7 constitute an action “in respect of infringement of copyright” within the meaning of sect. 10. The plaintiffs contended that proceedings under sect. 7 in respect of “infringing copies” might be taken in a case in which no infringement had occurred, having regard to the definition of “infringing” in sect. 35 and the provisions of sect. 14 as to the importation of copies. The argument is that copies imported in

breach of the provisions of sect. 14 are "imported in contravention of the provisions of this Act," and are, therefore, infringing copies within the definition in sect. 35, though ~~there has~~ been no infringement of copyright. I agree with my noble and learned friend LORD RUSSELL OF KILLOWEN that, by its terms, sect. 14 is made a substantive part of the Customs Act, and that a contravention of the provisions of sect. 14 A constitutes a contravention of the provisions of the Customs Act, and not a "contravention of the provisions of this Act" within the meaning of the definition in sect. 35. The use in sect. 14 of the phrase "prohibited by this section," in my opinion, presents no difficulty, when one finds the express direction that the section is to have effect as if it B were part of the Customs Act, for that, in my opinion, makes the prohibitions of the section substantive prohibitions of the Customs Act.

On the question of assessment of damages, I have little to add to the reasoning of my noble and learned friend LORD PORTER. Under sect. 7, the plaintiffs are to be treated as fictional owners of infringing copies, C which they did not create and would never have created. The conception of these infringing copies, where the plaintiffs' copyright matter is inextricably mixed by manufacture with the non-infringing matter, is in itself rather imaginary and problematical, and the question of their value is bound to be different from the question of the value of what D I may call the virgin value of the plaintiffs' copyright. The infringing copies are found in a setting created by the defendants, and I agree with my noble and learned friend that the court, in assessing the damages, is entitled and bound to take that setting into account, and that this will fairly be done by taking some proportion of the total value of the E volume, after making due allowance for expenses incurred after the act of conversion. I concur in the motion about to be proposed by my noble and learned friend LORD RUSSELL OF KILLOWEN.

LORD RUSSELL OF KILLOWEN: My Lords, in the course of the F hearing of these consolidated appeals, four matters arose for discussion and decision: (i) Whether, on the true construction of the Copyright Act, 1911, the respondents are entitled in respect of the same copies both to damages for infringement under sect. 6 and to damages for conversion under sect. 7. FARWELL, J., held that they were not. The Court of G Appeal held that they were. (ii) Whether sect. 10 of the Act applies to proceedings under or by virtue of sect. 7. CROSSMAN, J., held that it did apply. The Court of Appeal (MACKINNON, L.J., dissenting) held that it did not apply. (iii) What was the act of the appellants by which the infringing copies were converted? (iv) What is the proper measure H of the damages which the respondents sustained by reason of the conversion?

Upon the first question, I have had the advantage of reading and considering the opinions prepared by your Lordships upon this point, and I agree with the view that it is impossible to find any safe ground

upon which we would be justified in holding that the legislature intended that these remedies should be alternative, and not cumulative.

The second question is one of some difficulty. One would think that, since sect. 10 comes at the end of a group of five sections, grouped together under the title "civil remedies," the period of limitation thereby fixed

A was intended to apply to all proceedings for the enforcement of those remedies, or any of them. The remedies are for the protection of copyright. To this *prima facie* assumption two objections are suggested: (i) that an action under or by virtue of sect. 7 is not "an action in respect of infringement of copyright," and (ii) that proceedings might be taken

B under sect. 7 in a case where there had not been any infringement of copyright, and that, consequently, in such a case no point of time could exist from which the period of 3 years would commence to run. The second objection needs explanation. It depends on the joint effect of the definition of "infringing" in sect. 35 and the provisions of sect. 14

C relating to the importation into the United Kingdom of copies made out of the United Kingdom of any work in which copyright subsists which, if made in the United Kingdom, would infringe copyright. These copies I will for brevity refer to as foreign copies. The argument runs thus. "Infringing," when applied to a copy of a work in which copyright

D subsists, means any copy made or imported in contravention of the provisions of the Act. Therefore, "infringing copies" in sect. 7 include copies imported in contravention of the provisions of sect. 14. However, innocent importation does not constitute infringement. Therefore, sect. 7 applies to copies which may have come into existence without any

E act of infringement having taken place.

Having carefully considered the relevant provisions of the Act, I have come to the conclusion that these objections cannot prevail. Sect. 14, it is true, in terms prohibits the importation of foreign copies as to which the owner of the copyright gives notice to the Commissioners of

F Customs and Excise that he is desirous that such copies should not be imported, but the section is essentially a customs enactment. It provides (subsect. (1)) that the foreign copies as to which notice has been given shall be deemed to be included in the table of prohibitions and restrictions contained in the Customs Consolidation Act, 1876, s. 42, and that that

G section is to apply accordingly. The Commissioners of Customs and Excise are given power (subsect. (2)) to make regulations respecting the importation and forfeiture of such foreign copies. Reference is, no doubt, made twice to the importation "which is prohibited by this section." However, subsect. (6) provides:

H The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876.

What is the effect of that? It surely must be—indeed, it cannot help being—that the prohibition of the importation of foreign copies after notice given is in law a prohibition of the Customs Act, and that copies so imported are imported in contravention of that Act, and not in

contravention of the Copyright Act. This may seem at first sight a startling result, especially in face of the specific words which occur in sect. 14—namely, “the importation of which is prohibited by this section.” However, the prohibition, it must be remembered, is to have effect as if it were a prohibition which was part of the Customs Act. Moreover, this view produces consistency, for how can the fictional ownership conferred by sect. 7 of the Copyright Act exist side by side with the provisions of the Customs Act as to forfeiture and destruction of the objects included in the table contained in sect. 42 thereof? Fictional ownership is inconsistent with the forfeiture and destruction contemplated by sect. 42 of the Customs Act. The relevant words in the definition of “infringing”—namely, “imported in contravention of the provisions of this Act”—may properly be referred to importations in contravention of the provisions of sect. 2 (2) (d) and sect. 11 (1) (e), and are, therefore, necessary to the definition.

The result is that, if, as I think must be the case, sect. 7 does not apply to copies which are imported, notwithstanding the provisions of sect. 14, the foundation of the argument upon this point disappears, and there could never be a case of proceedings in respect of the conversion of infringing copies which had come into existence without any act of infringement having taken place. If this be so, then, in my opinion, every proceeding in respect of such conversion may reasonably be described as an action “in respect of infringement of copyright,” because the fictional ownership on which such proceedings are based involves the existence of a copyright and infringement of it, both of which facts would require to be pleaded and proved by the fictional owner.

A further consideration is that, if sect. 10 does not apply to proceedings under or by virtue of sect. 7, the period of limitation applicable to those proceedings will vary according to the country in which the proceedings are instituted. Under the Act of 1842, a uniform period of one year was fixed by sect. 26, but, on the respondents’ argument, the period would be 6 years in England and 40 years in Scotland, with the result that a plaintiff barred in England after 6 years could, upon founding jurisdiction in Scotland, claim in respect of all copies converted anywhere within 40 years.

My Lords, I am conscious that on any view there are difficulties of construction under the Act, but with me what was called the positional argument weighs most strongly. The only answer to it seemed to be the alleged impossibility, in certain cases under sect. 7, of fixing a starting point for the 3 years. For the reasons which I have endeavoured to explain, this alleged impossibility does not exist. Accordingly, the positional argument brings its full weight to bear, and I would hold that, as a matter of construction, sect. 10 applies to proceedings under sect. 7.

As regards the question as to what was the act of the appellants by which the infringing copies were converted, CROSSMAN, J., held that this took place when the order was given to bind up the sheets which

contained the infringing matter. In the Court of Appeal, SIR WILFRID GREENE, M.R., and ROMER, L.J., held that the delivery to the purchasers was the act of conversion. MACKINNON, L.J., thought that it was the sale of the volumes. I do not know that this is a question of any very great moment in the present case, but, in my opinion, the act of binding together the sheets which contained the infringing matter was the act of conversion. SIR WILFRID GREENE, M.R., and ROMER, L.J., based their view on the supposition that the delivery was the first evidence of any intention by the appellants to deal with the infringing copies adversely to the plaintiffs. However, as ATKIN, J., pointed out in *Lancashire & Yorkshire Ry. Co. v. MacNicol* (1), at p. 605, the question of intention is immaterial in cases where a man deals with goods as his own. If a man does that, one need not inquire as to his intention. MACKINNON, L.J., thought that the sale was the act which made impossible any delivery up by the appellants, but a man can convert the goods of another without parting with the possession of the goods. The only relevant question here is whether or not the appellants dealt with the infringing copies in a way inconsistent with the rights of the owner, and, if so, when. In my opinion, the answer must be that they did so deal with them when they commenced to get them stitched together for the purpose of incorporating them with their own property into a composite article—namely, a book. They then unequivocally dealt with them as their own, and, therefore, in a manner inconsistent with the rights of the plaintiff.

The remaining question is: What is the proper measure of damages for that conversion, which was in fact an unconscious conversion? My inclination, unassisted by your Lordships' opinions, would be to award only a small sum of some £35 or thereabouts. This would be upon the footing that the fictional property of the respondents which has been converted is not to be valued as being a proportionate part of a completed whole, but merely as being pieces of paper with printed matter thereon for which the appellants would be prepared to pay a sum equal to what it would cost them to replace them. However, CROSSMAN, J., the Court of Appeal and all your Lordships think otherwise. In these circumstances, I am not prepared to disturb this pleasing unanimity.

For the reasons which I have stated, I would affirm the order of the Court of Appeal dated Feb. 7, 1936, and I would discharge the order of the Court of Appeal dated Nov. 15, 1936, except in so far as it ordered the appellants here to pay the costs occasioned by their notice by way of cross-appeal. I would order the respondents here to pay the costs of their appeal to the Court of Appeal by notice dated Feb. 19, 1937, and also to pay to the appellants here two-thirds of their costs of the consolidated appeals to your Lordships' House.

LORD MACMILLAN [read by LORD PORTER]: My Lords, I am of opinion that, on a sound construction of the Copyright Act, 1911, the remedy of

damages for infringement provided by sect. 6 and the remedy of damages for conversion provided by sect. 7 are not in law mutually exclusive, and that the respondents are entitled in the present case to recover under both heads. I am also of opinion that the triennial limitation enacted in sect. 10 of the Act applies to a claim of damages for conversion under sect. 7.

As regards the act of conversion, this, in my view, was the binding up of the infringing sheets with the innocent sheets so as to form the volumes produced by the appellants. The question of the quantification of the damages for conversion I have found to be by no means an easy one. The difficulty lies, not so much in determining the principle on which damages for conversion should be awarded, for that is well settled, as in the application of the principle to a highly artificial situation. I am not satisfied that the Court of Appeal have erred in the method which they have adopted, and I accordingly agree with your Lordships that the damages under this head should be assessed at £150, being the figure which the Court of Appeal would have awarded had they held that the triennial limitation was applicable. Having reached these conclusions, I concur with the motion which I understand is about to be put to the House.

LORD ROCHE: My Lords, I have had the advantage of reading in advance the opinions both of those of your Lordships who have already spoken and of my noble and learned friend LORD PORTER. It is unnecessary for me either to recapitulate the facts or, save on one point, to add many observations to those which are contained in those opinions.

As to the first point, I think, with all your Lordships, that the Court of Appeal was right in reversing the judgment of FARWELL, J., and that the remedies are not alternative.

As to the second point, the period of limitation, the construction of the material sections of the Act seems to me to raise questions of great nicety and difficulty, and I confess that my mind has fluctuated as to the true conclusion to be reached. Upon the whole, however, I think that the result arrived at by MACKINNON, L.J., in his dissenting judgment is correct, and that the appeal upon this point should be allowed.

As to the third point, the relevant act of conversion, this was, in my opinion, the binding of the sheets, but I regard the act or process of stitching or binding as one and continuous from its commencement to its conclusion. I therefore regard the whole act or process as the act of conversion.

As to the fourth point, the measure of damages, I entertain no doubt that the judgments of CROSSMAN, J., and of the Court of Appeal were right as regards this matter, and I will state my reasons for my conclusion. The case for the appellants that the damages should be assessed at some small sum, be it £15 or £36, is, in my opinion, in contradiction of the principles of the law applicable to the assessment of damages generally

and of those applicable in particular to the assessment of damages in respect of the tort of conversion.

As to damages in general, there is no question but that the respondents are entitled to a just sum by way of indemnity to represent their loss by reason of the wrong done to them. That which, on the appellants' case, would be allowed seems to me to fall far short of representing such loss. The sheets were not merely capable of forming part of a complete work. They were adapted and destined and used for that purpose. They in fact formed one-twentieth part of a volume to be sold at 20s., and in fact sold at that price to the extent of 3,500 copies in the course of 3 years alone. In my judgment, in assessing loss, regard was properly given to that outstanding fact, and to ignore it would be to ignore the realities of the case.

The line of reasoning adopted by CROSSMAN, J., and the Court of Appeal seems to me to be equally justified by a consideration of the rules as to damages for the particular tort now in question. There is no dispute that the measure of damages is the value of the thing converted at the time of the conversion. It is true enough to say that the value is the value to the owner, but it is wrong to say this if you mean that which the owner will make out of the thing in money if it is not taken away from him. This latter idea was repelled by this House in a series of cases dealing with such trespasses to goods as temporarily deprived the owner of them. They were cases where the owner either did not use the things at all or did not use them for money gain—for example, spare lightships and dredgers. *The Mediana* (2) is an instance. It was said in the opinion of the EARL OF HALSBURY, L.C., in that case that, if the owner of a chair was deprived of it, it was no ground for giving nominal damages that he did not want to sit upon it, and that it might be necessary in such cases to resort to a variety of tests of value during the time of deprivation. One such suggested test was what would have to be paid by way of hire for such a chair or any chattel in question. It is true that that was a case of trespass, and not one of conversion, but the EARL OF HALSBURY, L.C., said that the same principles applied. So with permanent deprivation or wrongful appropriation of a chattel one of a variety of tests may be the best available test of value according to circumstances. In *Reid v. Fairbanks* (3), there was a very good one available, because the true owner had contracted to sell a ship under construction when finished for £x. It was held, or, rather, agreed (because the actual decision was on another point), that the damage was £x—£y, £y representing the cost of finishing the construction. Here, unfortunately, the available material is very different, and not so easy to deal with. The sheets in question only became the respondents' property after the appellants had brought them into existence by reproducing the respondents' letterpress and illustrations in a form useful, not for the respondents' publication, but for their own. I conceive that the proper test here is: what ought the appellants to have paid for that matter in the form in which it was when

converted? I say "ought to have paid" because of certain cases to which I propose to refer, but I do not think that the test of what they would have paid would yield a different result. The cases are such cases as were mentioned by appellants' counsel relating to trespass to land by the removal of coal, timber, and the like. These cases contain reference to a doctrine distinguishing an innocent from an intentional or fraudulent trespasser for the purposes of damages which is unknown to the law of conversion, but the utility of the cases seems to consist in the reference in the judgments and orders made to the "fair value" to be assessed. In one of them, the *Burmah Trading Corpn.* case (4), the available test of value adopted was the price realised, or to be realised, less expenses to be incurred in securing it. In such cases, to treat the wrongdoer as if he were a purchaser appears to me to be right. In assessing what he ought to pay or, which is the same thing, what is the fair value of the thing in question, its adaptability for a particular use may be an important element in its value. The triptych example furnished by the Court of Appeal is a strong example of this, and seems to me to be much in point here. The parties in this case seem to have proceeded on this basis of value. All the material put before CROSSMAN, J., was submitted on this basis. The figures and the agreement about the one-twentieth proportion seem to me to be consistent with no other view. The only question was what items should represent the true value. The appellants said the cost of printing, at most. CROSSMAN, J., thought that this was wrong, and so did the Court of Appeal, and it was unanimous upon this point. A similar conclusion had been reached in *Ash v. Dickie* (5), which I think was rightly decided. I am of opinion that in the present case CROSSMAN, J., and the Court of Appeal were right in rejecting the appellants' contention. It is not easy to see why the cost of printing only is to be taken. The articles in question would seem to be worth at least replacement value, and to replace the printed material would require the employment of a writer and a process engraver at the cost of money to which would fall to be added a proper share of all overhead and standing charges. I entirely accept the view that expenses incurred after the conversion should come off, and, although the binding was the only one which appears to have been so characterised below, I should have been prepared, had the appellants made a case asking for further proof, to consider whether there should not be a remit to CROSSMAN, J., to deal with other expenses. However, no such case or request was made, and the appellants stood on their printing basis. That seems to me, as I have said, to be wholly wrong.

I agree with my noble and learned friend LORD PORTER that the proper inquiry is not what the appellants would have given or the respondents have taken for the pirated material. As the appellants in fact used the material, the proper inquiry is as to its fair value. However, if the other test were to be adopted, I do not believe that, committed as the appellants were to this composite work, many copies of which had been sold as the process of conversion continued, they could reasonably have said, and in,

business would have said, anything other than that they would pay up to a proportion of the sale price, less what it would still cost them to realise that price. The court was bound to exercise its judgment on the materials submitted to it in a rather exceptional and peculiar case, where direct evidence of the parties or of experts would be either useless or inadmissible, and, though it may have proceeded by a *rusticum judicium*, in my opinion CROSSMAN, J., hit upon a figure which represents as nearly as may be the value to be assessed, and to interfere with it would, in the circumstances, be wrong, and to replace it by the appellants' figures would, in my opinion, for the reasons I have given, be unjust and erroneous. I am therefore for allowing the appeal only on the point of the period of limitation, and for restoring the judgment of CROSSMAN, J.

LORD PORTER : My Lords, this action raises a number of questions of some importance, two involving the construction of the Copyright Act, 1911, and two raising the more general question of the damages to be awarded against those who have, though inadvertently, made use of matter containing the copyright of others. It arises in this way. The plaintiffs are the owners of the copyright in a literary work entitled HEATING AND VENTILATING. The defendants are the publishers of a book entitled THE MODERN PRACTICAL PLUMBER, and have caused to be printed and sold a number of copies thereof. It is admitted that certain portions—we were told portions of four sheets—of the defendants' work are infringements of the plaintiffs' copyright.

The plaintiffs, by writ dated May 2, 1935, brought an action against the defendants, claiming (i) an injunction restraining the infringements, (ii) an inquiry as to damages, and (iii) delivery up of all infringing books and material. The defendants admitted the infringement, and, while relying on the Copyright Act, 1911, s. 10, and the Statute of Limitations, offered to submit to judgment on their admissions. However, they contended, first, that the plaintiffs were not entitled both to damages for infringement of copyright under sect. 6 (1) of the Act and at the same time to damages for conversion under sect. 7. They said that the plaintiffs must elect which remedy they would take. Secondly, they contended that the limit of 3 years provided by sect. 10 of the Act applied both to a claim for infringement under sect. 6 and to a claim for conversion under sect. 7. Thirdly, they contended that the conversion was the printing or order to bind or binding of their work, and not its sale. Fourthly, they contended that the damages were not to be calculated by finding the price of their complete work (of which the part containing the plaintiffs' copyright constituted only a small fraction) and then attributing to the plaintiffs' copyright some portion of that price, after making due allowance for the cost of binding, but was the value of the plaintiffs' work to the plaintiffs as contained in the four sheets, a value which they said was mere pulping value, or, at most, a small portion of the cost of the production of the whole work.

At the hearing before this House, the defendants were content to take the binding as the act of conversion, and both sides accepted the position that, if the damages for conversion were to be calculated by reference to the value of the whole volume, the proper proportion to be taken was one-twentieth.

As to the first point, FARWELL, J., who was asked to give a decision A upon that alone, decided that the remedies under sects. 6 and 7 were alternative, and not cumulative. He was reversed by the Court of Appeal, who held that the damages were cumulative, but that care must be taken that they did not overlap so as to give the plaintiffs the same damages twice over. Upon the other points, CROSSMAN, J., B to whom they were referred after the judgment of the Court of Appeal, decided that the three-years' limit applied to both claims, that the order for binding was the conversion, and that the only way in which he could determine the value of the respondents' portion of the work was to take the selling-price of the whole volume, find what proportion C was attributable to the plaintiffs, and, after making due allowance for the binding (which, in his view, was an expense incurred after the conversion), divide the total price by that proportion and multiply it by the number of copies sold. In this way he arrived at a sum of 1s. D per volume as the value of that part of the work which infringed the plaintiffs' copyright, and, as about 3,000 copies had been sold during the 3 years preceding the date on which action was brought, at a sum of £150 as the value of the converted portion. He found also that the plaintiffs had not by reason of the infringement suffered any loss of sales, and he therefore awarded no sum to the plaintiffs in respect of any such E loss. However, he found that the plaintiffs had suffered in reputation from the infringement, and gave a sum of £50 as damages under this head. Of this last award no complaint is made.

The Court of Appeal differed from the judge, taking the view, by a majority, that the three-years' limitation applied only to the damages F under sect. 6, and that the ordinary period of 6 years was the proper period of limitation under sect. 7. They also held that the act of conversion was not the order for binding, but the sale of the infringing work. Otherwise they affirmed the judgment of CROSSMAN, J., and so arrived at a figure of £494, since the number of copies sold during 6 years G before action brought, multiplied by 1s. per volume, made up that figure.

The appellants argued in the Court of Appeal, as they had argued before CROSSMAN, J., that the true measure of value was the value of the infringing portion of the four sheets to the plaintiffs, and that that value was no more than the pulping value, since the plaintiffs could make no use of H them, or, if the possibility of the defendants paying for them rather than incurring the expense of having the peccant sheets rewritten and reprinted is to be taken into consideration, the value was at most something slightly more than the cost of printing those sheets and the cost of the paper itself. That sum, they said, was approximately represented by one-

twentieth of 1s. 4d. per volume. They further argued that in any case the value of each volume was not 21s. less binding, but that a proper sum for the cost of disposing of the volumes sold, so far as that cost was incurred after the conversion, must be deducted.

As to the appellants' first contention, the Act by sect. 6 gives certain remedies for infringement of copyright, including an injunction, damages and accounts. By sect. 7, it enacts that infringing copies shall be deemed to be the property of the owner of the copyright, and states that accordingly the owner may take proceedings to recover possession of them or in respect of their conversion. I do not see that these rights are necessarily inconsistent one with another. No doubt, as is pointed out by SIR WILFRID GREENE, M.R., the damages may overlap, but the overlapping of damages is no new thing in English law. Two persons may cause an accident by separate acts of negligence, and judgment for the whole damages may be given against each. So, too, damages to the full value of the property converted may be given against two persons for successive conversions of the same chattel, and, until payment in full of the sum awarded is made by one of the defendants, the judgment remains in force against the other. In neither case, however, would the plaintiff be permitted to recover more than the sum awarded for the injuries received or the value of the chattel, as the case might be, because the law will not permit any greater sum to be recovered than that representing the actual damage suffered.

It was sought to distinguish those cases from the present on the ground that in them the recovery was against two persons, and that in the present case both sets of damages would be awarded against the same person. No doubt where the judgment is against one person the recovery of double damages would be avoided, not by preventing the receiving of double damages after judgment given, but by diminishing the damages given under the judgment, e.g., in the present case, by diminishing the damages under the head of infringement so that they do not include anything given under conversion. Of the two methods, however, the second seems to give rise to the lesser difficulty, if there be in fact any difference in principle. The argument to the contrary, however, as I understand it, proceeds thus. Sect. 6 gives, amongst other remedies, damages for infringement or an account of profits. Those remedies are alternative, not cumulative. An account of profits is also alternative to damages for conversion, and, therefore, damages for infringement are alternative to damages for conversion. I do not think the result follows. The grounds on which a claim for damages and an account have been held to be incompatible are that a claim for an account condones the infringement: *De Vitre v. Betts* (6) and *Neilson v. Betts* (7), at p. 22. For the same reason—namely, that by doing so the plaintiff affirms the action of the converter—it is possible for a plaintiff to lose his remedy in conversion by electing to sue for money had and received, and so waiving the tort: *Smith v. Baker* (8). In

the present case, however, the respondents have not sued for an account or for money had and received, and I cannot see that they have waived their remedy either for the one tort or for the other by electing to sue for both as torts. To succeed, the appellants must show that the remedies under sect. 6 and sect. 7 are mutually exclusive, and I do not think that they have done so. Indeed, there are indications in the two sections which lead to a contrary conclusion. Could it be said, for instance, that, where a defendant has in his possession infringing plates, and has by their means produced and sold infringing copies, a plaintiff would lose his remedy for infringement because he also claimed in detinue to recover the plates? So to hold would prevent the plaintiff from recovering his actual loss by reason of the infringement, even though he might recoup himself by using the plates to make his own copies. He might not desire to do so, and, in any case, the Act has made the plates his to use as he pleases. I think that the decision of the Court of Appeal was right in this case, and that, at any rate so far as it involved the same view, the decision of the Court of Appeal in *Ash v. Hutchinson & Co. (Publishers), Ltd.* (9) was right also.

As to the appellants' second contention, the limitations of time in respect of which recovery may be made under this Act give rise to great difficulty. The words to be construed are contained in sect. 10, and are as follow :

An action in respect of infringement of copyright shall not be commenced after the expiration of 3 years next after the infringement.

Does this section apply only to an action for infringement under sect. 6, or does it also cover an action brought under sect. 7 in respect of infringing copies? By sect. 35 of the Act :

... "Infringing," when applied to a copy . . . means any copy . . . made, or imported in contravention of the provisions of this Act . . .

When, therefore, sect. 7 uses the phrase infringing copies, the words "copies made or imported in contravention of the provisions of the Act" may be substituted. The difference between the words used in sect. 6 and those used in sect. 7 is marked and patent. In sect. 6 (1) they run, "where copyright has been infringed," in sect. 6 (2), "in respect of infringement," in sect. 6 (3) "for infringement," and in sect. 6 (3) (b), "in respect of the infringement." Unless the words "infringing copies" connote infringement, there is no mention of infringement in sect. 7. Of course, if no action in respect of an infringing copy is possible save where there has been an infringement, such an action might well be included in the phrase "action in respect of an infringement." Is, then, an infringement necessary in the case of an infringing copy? One instance to the contrary is suggested in the case of a copy which is imported in contravention of sect. 14 of the Act, i.e., a copy which is made out of the United Kingdom of any work which, if made in the United Kingdom, would infringe copyright, and as to which the appropriate notice to the Commissioners of Customs

and Excise has been given. That section in terms forbids the importation of such copies, and speaks of them as "prohibited by this section."

A It was argued on behalf of the appellants that importation in breach of the terms of sect. 14 was not in essence a contravention of the Copyright Act, 1911, but was really a breach of the Customs Consolidation Act, 1876, and that the true effect of sect. 14 was merely to apply the provisions of the Customs Consolidation Act to attempts to import copies of matter which is the subject of copyright in this country. It was further contended that infringing copies could not have been intended to include copies imported in contravention of that section, since B the Customs Consolidation Act made the copies forfeit and subject to destruction or other disposal as the Commissioners of Customs might direct. Such a right in the commissioners, it was said, was inconsistent with the ownership being deemed to belong to the owner of the copyright under sect. 7. Sect. 14, the appellants argued, assumed that the C copies would be seized at the place of importation, or at any rate by the commissioners, and, though they might escape detection, they could not be said to be "imported" within the meaning placed upon that word in the definition of "infringing" in sect. 35. In this view, imported infringing copies would be confined to copies which the importer knew D to be infringements, or which he knew would be infringements if made in the place of importation.

The difficulty caused by the wording of sect. 35 persists, but the contention has force. It is strengthened by the position of sect. 10 at the end of a number of sections headed *Civil remedies*, amongst which is E included sect. 7, and by the fact that even a three-years' limitation is an extension of the one year given by the Copyright Act, 1842. Its weakness lies in the distinction apparently drawn in the wording of the later Act between infringement and infringing copies, and in the difficulty of ascertaining the date from which time is to run where no F infringement in fact takes place. In the case of an argument so evenly balanced, I should not myself have felt justified in differing from the majority of the Court of Appeal, but, as your Lordships take a different view, I am not prepared to dissent from the opinions which have been expressed. I am the more ready to accept this view as I cannot but G believe that, whatever its wording may express, the intention of the Act was to limit the right of action to a term of 3 years in all cases.

Under the head of damages, two further questions arise: (i) what is the act of conversion? and (ii) what damages flow from that act? As to the first question, conversion was defined by ATKIN, J., as he H then was, in *Lancashire & Yorkshire Ry. Co. v. MacNicoll* (1), at p. 605: . . . dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.

This definition was approved by SCRUTTON, L.J., in *Oakley v. Lyster* (10). ATKIN, J., goes on to point out that, where the act done is necessarily

a denial of the owner's right, or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of, or intend to challenge, the property or possession of the true owner.

In the present case, Sir Stafford Cripps, I think rightly, conceded that the mere printing of the infringing matter could not amount to conversion, since no copy—and, therefore, no infringing copy—was in existence until after the printing had been done. He further admitted that he could not rely upon the order for binding. Until the binding took place, the infringing matter was still under the control of the defendants in an unaltered form, and mere possession of the property of others is not conversion, since, by a fiction, the original possession is regarded as lawful. He argued, however, that the infringing copy was not the book, or part of the book, but such portion of the four unbound sheets as contained infringing matter, and that the binding was the act of conversion. With the last contention I agree. I think that the binding was an act inconsistent with the owner's right. This is a view midway between that held by CROSSMAN, J., and that held by the Court of Appeal. I should myself have thought that the conversion was not complete until the binding was complete, and that we must not too meticulously regard the conversion as taking place when the binders insert the first and second stitch. Therefore, when one is considering the value of the infringing matter, one should regard it as part of a bound volume ready for sale, and what the appellants would pay to avoid unstitching and rebinding is one of the matters to be taken into account. However, I doubt if this makes any, or any substantial, difference to the value I should put upon the infringing matter.

As to the second question, there is no dispute as to the principle on which in general the measure of damages of conversion is calculated. It is the value of the thing converted at the date of conversion, and this principle was accepted by both sides in the present case. However, I should wish to leave open for consideration, in a case in which it directly arises, the question whether or not the statement of ABBOTT, C.J., in *Greening v. Wilkinson* (11), at p. 626, that the jury may give the value at the date of conversion or at any subsequent time can be supported. The appellants sought to place a qualification upon the words "the value of the thing converted" by adding the words "to the owner." Such a qualification is, I think, inaccurate, and likely to lead to confusion of thought.

I do not accept the view that an article has no value, or a diminished value, to its owner because he has no machinery for selling it. Has a book a different and diminished value to me, who have just purchased it, from that which it had a moment before, in the hand of the bookseller, even though the bookseller will not take it back, and I have no market

A for its sale? The value is not necessarily the price for which the owner can sell the article. Is a publisher who infringes an author's copyright to be permitted to make a large profit out of an unexpectedly successful book because he could have bought the copyright cheaply if, before the publication, he had approached the author and paid his price? Even
B the loss of the use for a time of a chattel which the owner would not have used during that time may give rise to substantial damage, whether in an action for damages or in an action for conversion: *The Mediana* (2). It is the value, known or unknown, which has to be paid, and that value is not necessarily the price which the owner could have obtained or
C would have taken. It may have to be ascertained by finding out what price for the infringing matter, in the form in which it is offered, the public or some individual is prepared to pay, or in some other way in the light of after events.

D In the present case, so far as one is able to judge by the steps which they took, the respondents were not anxious to dispose of their copyright at all. In the action, they claimed an injunction to prevent further infringements of copyright, and delivery up of all infringing matter in the appellants' hands. They could claim damages only for conversion in respect of the matter used in the copies sold, since it was too late to
E recover the matter itself. I will assume that the infringing matter is such part of the four sheets before binding as contains a portion of the respondents' copyright. If the sheets were still in the appellants' possession, the infringing matter might be cut out and handed over to the respondents. Obviously, this material would be useless to them, but,
F equally, the appellants would be left with four mutilated sheets, parts of volumes which they desired to bind at once and sell, volumes which, judging from the figures supplied to the Court, the market was ready to absorb. To cope with this demand, the appellants would have had to employ some one else to fill up the gaps left, to reprint the peccant sheets and bind the volumes. In those circumstances, I cannot but think that they would have paid a substantial price for the copyright matter printed in the infringing sheets, and I do not think that I should regard 1s. per copy as too much. In truth, however, I do not think myself justified in speculating as to what sum, in a bargain between the appellants and
G the respondents, the one would pay or the other accept. Indeed, to inquire what is the value of the infringing matter so removed from its context is, to my mind, an artificial way of considering the problem. The respondents' property has in fact been incorporated in the appellants' volume and sold to the public. The appellants never considered what
H they would have been willing to pay as each infringing copy was bound into the volume, nor the respondents what they would have been willing to receive if they had been prepared to sell at all. The two parties have in fact combined in furnishing (though unwittingly on the respondents' part) material for a volume in which it was afterwards incorporated and sold.

In such circumstances, if one considers how the property has actually been treated, the value of the respondents' part is not unfairly calculated by taking some proportion of the total value of the volume (after making due allowance for expenses incurred after the act of conversion) and multiplying that proportion by the number of copies sold. This was the method adopted by both courts below, and in principle, I think, in *Ash v. Dickie* (5) and *John Lane, Bodley Head, Ltd. v. Associated Newspapers, Ltd.* (12). I can see no legal objection to its adoption. If no such method can be adopted, then I see no answer to the difficulty suggested in the Court of Appeal arising in a case where A converts three parts of a triptych belonging to three separate owners—X, Y and Z—joins them together, and produces an article infinitely more valuable than the sum of its parts. To hold that X, Y or Z can recover only what he would get for his part in a market in which the other parts are not procurable would be to leave the converter in possession of a large sum of money to which none of the owners would be entitled.

The resultant figure is, of course, but a rough-and-ready test of the true value, and must be modified by the court, which has to determine it in accordance with the facts of each case, but in the present case it is admitted that, if the method adopted was not wrong in principle, the proportion of one-twentieth part was not unfair. Some discussion took place as to what allowances were permissible. The cost of binding has been allowed, but Sir Stafford Cripps contended that the cost of collection and delivery and the expense of advertising and selling should also be deducted. I should myself be for allowing all expenses properly and necessarily incurred by the appellants, after the conversion, in selling the volumes containing the respondents' copyright matter, in so far as those expenses would not have been incurred but for the sale of those volumes. However, the appellants are wrongdoers, albeit unintentional wrongdoers, and it is for them to show that, after the conversion took place, they necessarily expended the money for which they seek to get credit. It is admitted that there is no evidence to this effect except the probability that the expenses claimed, or at any rate some part of them, would be incurred after that date. I see no ground for making this assumption. It may or may not be correct. It has not been proved, and, in any case, it is not clear that the same expenditure would not have taken place whether or not the appellants had sold the infringing volumes in the course of their general business. I concur in the motion proposed by my noble and learned friend LORD RUSSELL OF KILLOWEN.

Appeals allowed to the extent only of restoring the judgment of CROSSMAN, J., with costs as restricted.

Solicitors : *Oswald Hickson, Collier & Co.* (for the appellants) ; *White & Leonard & Nicholls & Co.* (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

GOKAL CHAND-JAGAN NATH (FIRM) v. NAND RAM
DAS-ATMA RAM (FIRM).

[PRIVY COUNCIL (Lord Wright, Lord Romer, Lord Porter, Sir Shadi Lal and Sir George Rankin), **July 12, 14, October 21, 1938.**]

A *Privy Council—India—Agency—Sales by agent on commission—Payment to be made to agent—Buyer in financial difficulties—Compromise by agent—Duty of agent—Onus of proof.*

B The respondents, a firm of commission agents in Calcutta, were employed by the appellants, a firm of merchants, to conduct transactions for the purchase and sale of sugar and the purchase of gunny bags, between 1919 and 1922. Three transactions were executed by the respondents on behalf of the appellants with parties in financial difficulties, and in the result the respondents succeeded in obtaining payment of a part only of the indebtedness. The appellants instituted proceedings to recover from the respondents the outstanding balance due from the third parties, after giving credit in reduction for money actually recovered and paid over to the appellants by the respondents :—

C **HELD :** the duty of the respondents as agents of the appellants was to exercise due care, skill and judgment in getting in what they could by making the best bargain possible in the circumstances. The onus was on the appellants to prove that the respondents had failed in that duty and had been guilty of negligence, and this they had not discharged. The evidence in fact established that they had recovered a substantial amount of the indebtedness, and that they could not have recovered any more.

D *Russell v. Palmer* (4) applied.

[EDITORIAL NOTE. Where it is in the ordinary course of business for the agent to receive payment for his principal, such payment must generally be in cash. The position arising where the debtor is in pecuniary difficulties has not often been considered, but it is here laid down by the Privy Council that the agent's duty is to obtain as much as possible of the debt, and, in doing so, he may take anything of value in discharge of the debt. So long as the agent acts reasonably, and there are reasonable grounds at the time of the settlement for thinking that it is the best settlement that could be made, he has fulfilled his duty to the principal.

F AS TO AGENT RECEIVING PAYMENT, see HALSBURY, Hailsham Edn., Vol. 1, p. 218, para. 377; and FOR CASES, see DIGEST, Vol. 1, pp. 368-370, Nos. 768-784.]

Cases referred to :

- G** (1) *Blumberg v. Life Interests & Reversionary Securities Corp'n., Ltd.*, [1897] 1 Ch. 171; 1 Digest 366, 751; 66 L.J.Ch. 127; 75 L.T. 627; *affd.* on another point, [1898] 1 Ch. 27.
- (2) *Williams v. Evans* (1866), L.R. 1 Q.B. 352; 1 Digest 366, 746; 35 L.J.Q.B. 111; 13 L.T. 753.
- (3) *Papé v. Westacott*, [1894] 1 Q.B. 272; 1 Digest 366, 747; 63 L.J.Q.B. 222; 70 L.T. 18.
- (4) *Russell v. Palmer* (1767), 2 Wils. K.B. 325.
- H** (5) *Wiltshire v. Sims* (1808), 1 Camp. 258; 1 Digest 375, 817.
- (6) *Gabriel (Thomas) & Sons v. Churchill & Sim*, [1914] 3 K.B. 1272; 1 Digest 280, 127; 84 L.J.K.B. 233; 111 L.T. 933.
- (7) *Overend, Gurney & Co. v. Gibb* (1872), L.R. 5 H.L. 480; 1 Digest 435, 1265; 42 L.J.Ch. 67.

APPEAL from a judgment and decree of the High Court of Judicature at Lahore (HARRISON and AGHA HAIDER, JJ.), dated Feb. 22, 1933,

modifying, and, in the main, overruling, a judgment and decree of the senior subordinate judge at Sialkot, dated May 31, 1926, and also from an order of the Lahore High Court, dated June 5, 1933.

C. S. Rewcastle, K.C., and *Dingle Foot* for the appellants.

S. P. Khambatta for the respondents.

Rewcastle, K.C.: It is the duty of the agent to communicate to the principal where the third party fails to pay in cash, and to leave it to the principal to decide whether any settlement ought to be arrived at in any form other than cash, or whether the agent should give credit to a third party. In the absence of such instructions, the agent has no implied authority to give credit or to act as he thinks fit and proper in the circumstances. It is the duty of the agent to communicate with the principal the fact that the financial position of the third party is shaky. The agent is therefore liable for the loss accruing to the principal by the insolvency of the debtor to whom he had given long credit. [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 1, pp. 218, 246, *Wiltshire v. Sims* (5), *Williams v. Evans* (2), *Blumberg v. Life Interests & Reversionary Securities Corpn., Ltd.* (1), *Russell v. Palmer* (4), *Papé v. Westacott* (3) and POLLOCK & MULLA'S INDIAN CONTRACT ACT, 6th Edn., p. 565.] The agent is liable to the principal for interests on moneys wrongfully detained for the period of detention; POLLOCK & MULLA'S INDIAN CONTRACT ACT, 6th Edn., p. 429. The judgment of the High Court is invalid on the ground that it does not comply with the provisions of the Code of Civil Procedure, Ord. 41, r. 31.

Khambatta: On the facts of this case, the respondents are only brokers and not auctioneers nor factors. As brokers, they had implied authority, to sell on reasonable credit and without notice to the principal. The contention for the appellants, if applied to the facts of this case, would make the respondents guarantors of the debts on the debtor's insolvency. Therefore it cannot be relied upon as a reply to the facts of this case. [Counsel referred to *Gabriel (Thomas) & Sons v. Churchill & Sim* (6).] The respondents can only be made responsible for the debts to the extent that it can be established that they are negligent in seeking to realise that the loss resulted to the appellants from the negligence referred to: *Overend, Gurney & Co. v. Gibb* (7).

The judgment of their Lordships was delivered by LORD WRIGHT.

LORD WRIGHT.: The appellants are a firm of merchants carrying on business at Sialkot. The respondents are a firm of commission agents in Calcutta, who, from between 1919 and 1922, were employed by the appellants to conduct transactions for the purchase and sale of sugar and the purchase of gunny bags. The question in this appeal relates to three transactions executed by the respondents on behalf of the appellants in accordance with this course of business. These transactions were duly closed by the respondents with the other parties, and in the result three sums of money were respectively due on the balance of the transactions—

from Diwan Chand-Amar Chand, Rs. 1,275, from Chatter Bhuj Dossa, Rs. 8,670, and from Kalu Ram Kanhaya Lal, Rs. 510. This was the position when the transactions were closed in Oct., 1920. However, the three parties were in financial difficulties, and in the result the respondents succeeded in obtaining payment of a part only of this indebtedness.

- A This action was brought to recover from the respondents the differences between the sums recovered from the third parties and the sums of indebtedness set out above. The largest debtor was the firm of Chatter Bhuj Dossa, from whom, in the result, when the firm became insolvent in May, 1922, there was still a considerable sum outstanding. The respondents had taken *hundis* on account in Mar., 1921, and renewals in Oct., 1921, but no cash payment had been obtained save Rs. 764-15-3. The *hundis* which were taken were in the respondents' favour, and included sums other than those due in respect of the transactions conducted for the appellants. The respondents, as commission agents, had, in the ordinary course, in each case conducted the transactions in their own name, and taken a settlement from the third party for the whole balance of the account between them and that party, themselves apportioning that total sum between their different constituents, including the appellants. The appellants, for whom they had acted on that account, were not consulted before the *hundis* were taken, nor did they give any express authority to the respondents to accept *hundis*. The claim in the action was to recover the outstanding balance due to the appellants from the third parties, after giving credit in reduction for money actually recovered and paid over to the appellants by the respondents. The course of business in regard to the other two firms was the same, save that in their cases the debts for the balance became ultimately time-barred.

The subordinate judge held that the respondents were liable to pay to the appellants the sums not recovered from the third parties, on the ground that the respondents, as agents, in giving credit to the third parties instead of recovering money from them, did so at their risk, especially if the third parties' financial position was shaky, and were therefore answerable to the appellants, as their principals, for the amounts of the debts ultimately not recovered. In other words, he held that the agent was liable for the loss accruing to the principal by the insolvency of the debtor to whom he had given long credit. He also dealt with questions of interest and other matters of account. From this judgment, an appeal was taken to the High Court. That court reversed the judgment of the subordinate judge, apart from questions of interest, to which reference will be made later.

- H The High Court were unable to accept the statement of principle which has been quoted above as the principle on which the subordinate judge proceeded. In their opinion, the true principle was that the duty which the respondents, as agents, owed to the appellants, their principals, was to exercise due care, skill and judgment in getting in what they could, by making the best bargain possible in the circumstances. The court

held that in the present case it was for the appellants, as plaintiffs, to prove that the respondents, as defendants, had failed in that duty, and had been guilty of negligence, and that they had failed to do so. On the contrary, the court held, on the evidence, that it was established that the respondents did all that was reasonably possible, and that it was no fault of theirs that the realisations were not larger than they were. A They accordingly varied the judgment of the subordinate judge by reducing the decretal amount to Rs. 5,919-8-3, which represented the money actually collected by the respondents in respect of the three debtors, together with interest from the date of the institution of the suit until payment at 6 per cent. per annum. B

Their Lordships are in agreement with the High Court as to the principles to be applied. They have also considered the evidence in the case, and are of opinion that the conclusions of fact arrived at by the High Court are fully justified. On the question of principle, their judgment is that the case in question depends on determining what is the C duty of an agent in a case where the third party, debtor to the principal, is financially embarrassed. His duty then, in their judgment, is to do his best to collect all he can in the circumstances. It may be that it is more prudent not to press the debtor into immediate bankruptcy, but to take what he can in cash at the moment and to give time for the balance. D This is what the respondents did in this case. They recovered a substantial amount of the indebtedness, and there is no evidence that they could have recovered more. The evidence is that they could not. The appellants' counsel have strenuously contended that the respondents are liable for the whole amounts eventually left outstanding, on the E ground that an agent is in general bound to receive cash in settlement of debts due to his principal, and has no right to give credit without express instructions from his principal, whereas in the present case the appellants gave no such instructions, and the respondents did not even ask for instructions, until a later date, after they had accepted the *hundis*. On this F point, it is retorted, that the appellants took no notice of this request for instructions. Apart from that, however, their Lordships are of opinion that the propositions relied on by the appellants are not applicable to a case like this. There are various authorities to the effect that an agent's authority is at least presumptively to settle in cash, in the absence of express G authority to the contrary effect or of an authority by custom or usage. Thus, in *Blumberg v. Life Interests & Reversionary Securities Corpn., Ltd.* (1), the question was whether a valid tender of mortgage money had been made. It was held that it had not, because it had been made by cheque, which was not a good tender. Again, in *Williams v. Evans* (2), H it was held that a purchaser at an auction sale could not claim that he had paid the purchase price as against the seller when he had purported to do so by giving a bill of exchange to the auctioneer. That was no payment to discharge the purchaser as against the seller. Similarly, in *Papé v. Westacott* (3), an agent was held liable for parting with a

licence against a cheque which was dishonoured, whereas he was only authorised to do so against cash. It is not necessary to multiply authorities on this point. However, the position here is very different. This is a case where, the debtor being in financial difficulties, the agent gets all the cash he can and does his best to secure cash for the residue of the debt, thinking it best to give the debtor some time to pay. There is not here any question of an authority limited to receiving cash, nor is the agent giving up any valuable thing or right which he should not have given up save against cash. In fact, his duty is to do the best he can to get cash. The onus is on the plaintiff in such a case to prove that the agent has failed in that duty and that the plaintiff has suffered damage, which he can do only by showing that the agent could have realised more cash in the circumstances of the case than he actually did. The onus is on the plaintiff to prove the breach of duty and the damage. An old case, *Russell v. Palmer* (4), illustrates that principle. The defendant was an attorney who, by his negligence, had failed duly to charge a judgment debtor in execution, so that he was released from the prison in which he was held in respect of the debt. It was decided that the defendant was not liable for the whole debt, but only for such part of it as might have been realised by execution, because the action sounded only in damages. So in the present case the respondents did not become guarantors of the debts on the debtors' insolvency. They could be made responsible for the debts only to the extent that it could be established (i) that they were negligent in seeking to realise them, and (ii) that loss resulted to the appellants from that negligence. Their Lordships agree with the High Court that the appellants have failed on both points, and they are of opinion that the appeal fails, and should be dismissed with costs. They will humbly so advise His Majesty.

Appeal dismissed with costs.

Solicitors : *R. S. Nehra* (for the appellants) ; *T. L. Wilson & Co.* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

B. G. UTTING & CO., LTD. v. HUGHES.

[KING'S BENCH DIVISION (Macnaghten, J.), November 4, 7, 8, 1938.]

Income Tax—Profits—Speculative builder—Sale of house for premium and ground rent—Capital Value of ground rent as trading profit.

The appellant company carried on the business of speculative builders, building houses upon land owned by them, and, upon the completion of the building, disposing of some of the houses by granting a 99-years' lease in consideration of a premium paid in cash and the reservation of a ground rent. The question was whether the capital value of the ground rent, or, as it might be called, the reversion expectant on the determination of the lease, should be brought in as a receipt at the date of the transaction in the company's accounts:—

HELD : the capital value of the ground rents ought to be so brought into the accounts.

[EDITORIAL NOTE.] The decision in *Emery (John) & Sons v. Inland Revenue Comrs.* (3) turned upon certain Scottish terms, and it might have been doubted how far the principle applied to the case of ground rents in England. A doubt had also arisen by reason of a conflicting Irish decision. However, the judge finds that the principle laid down in *Emery (John) & Sons v. Inland Revenue Comrs.* (3) is applicable to the case of English ground rents. The commissioners speak of the realisable value of the ground rents and the judgment speaks of the reversion expectant upon the determination of the lease. In fact, upon the sale of a freehold ground rent of this nature the price would be determined partly by the right to receive the rent during the term, and partly by the right to the reversion at the end of the term. A

AS TO INCOME TAX ON SALE OF PROPERTIES BY BUILDERS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 100, 101, para. 194; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 122c-122f.] B

Cases referred to :

- (1) *Birch v. Delaney*, [1936] I.R. 517; Digest Supp.
- (2) *Fry v. Salisbury House Estate, Ltd.*, *Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.*, [1930] 1 K.B. 304. C
- (3) *Emery (John) & Sons v. Inland Revenue Comrs.*, [1937] A.C. 91; Digest Supp.; 156 L.T. 87.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the court as to the correct method of arriving at the assessment to income tax of the appellant company, which carried on the business of speculative builders, under the Income Tax Act, 1918, Sched. D, Case I, for the years ended Apr. 5, 1936, and Apr. 5, 1937, respectively. The facts are fully set out in the judgment. D

The contentions on behalf of the company were: (a) that both the premiums received on the granting of the leases and the ground rents reserved are profits arising to the company from the ownership of land in respect of which the company was taxable only under Sched. A, in support of which *Fry v. Salisbury House Estate, Ltd.* (2) and *Birch v. Delaney* (1) were referred to; (b) that *Emery (John) & Sons v. Inland Revenue Comrs.* (3) is distinguishable, on the ground that in that case the builders had disposed of their entire interest in the land for money's worth; (c) that the right to the ground rents is inseparable from the company's reversionary estate in the lands subject to the leases, and in computing the company's profits for assessment to income tax under Sched. D no addition falls to be made in respect of such right; and (d) alternatively, that, if the value of the reversionary estate retained by the company or of the right to receive the ground rents falls to be included in the computation of the profits of the company's trade for the purposes of Sched. D, no profit arises to the company in respect of the value of such reversion or ground rents until the sale thereof, and that, until the reversion is realised, such value falls to be brought into account only at cost, or at market value if that is less than cost. E F G H

The contentions on behalf of the inspector of taxes were: (a) that the company in the course of its trading had sold houses and land on 99-years'

leases in each case for a cash payment and money's worth—that is, the right to receive a ground rent; (b) that these cash payments were trading receipts of the company, and, as such, fell to be included in the computation of the company's profits for the purposes of assessment under Sched. D, Case I; (c) that the right to receive ground rents was
A a part of the consideration for which the company had disposed of land and houses, and was a right which could readily be turned into money, and was a trading receipt equally with the cash payments; (d) that (i) the realisable value of these ground rents ought to be added to the amount of the company's trading receipts credited in the company's accounts
B in order to ascertain the trading profits for the purposes of assessment under Sched. D, Case I, or that (ii) alternatively, if the cost price or market value (whichever was the lower) had to be taken, the method contended for by the appellant company was wrong; (e) that *Birch v. Delaney* (1) was wrongly decided; and (f) that, upon the facts proved,
C this case was in principle indistinguishable from *Emery (John) & Sons v. Inland Revenue Comrs.* (3).

The commissioners decided as follows:

Whichever method of disposal is adopted, the transaction is a transaction in the course of the company's trading.

D No question arises on this appeal as regards those cases where the company has sold freeholds, but, in the cases where houses have been disposed of by way of sub-demise for a term of years subject to ground rents, it is argued that the company is not liable to be assessed under Sched. D. in respect of the amount of the premiums received or in respect of the capitalised value of the ground rents. In support of this contention, the company relies on *Birch v. Delaney* (1). We have considered the judgment of the Supreme Court of Southern Ireland, delivered by FITZGIBBON, J. In our opinion, the decision is not in accordance with the principles laid down by
E the House of Lords in *Emery (John) & Sons v. Inland Revenue Comrs.* (3). We think that the law was correctly stated in the judgments of HANNA and O'BYRNE, JJ., in the High Court.

Upon the documents and facts before us, we hold that, where houses have been disposed of by way of 99 years' leases at ground rents, completed sales in the course of the company's trade have been effected, and, in our opinion, the proceeds of those sales must be brought into the company's trading accounts.

F We hold that the correct method of dealing with these transactions in the company's accounts is to bring in as receipts from sales the amount of the premiums plus the realisable value of the ground rents at the date of the transactions.

We heard no evidence as to the realisable value of the ground rents, and, failing agreement between the parties on this point, the case will have to be set down for further hearing.

A. M. Latter, K.C., and J. S. Scrimgeour for the appellants.

G The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondent.

H MACNAGHTEN, J.: The appellant company was incorporated on Mar. 11, 1935, under the Companies Act, 1929, for the purpose, *inter alia*, of carrying on the business of speculative builders, and since its incorporation it has in fact carried on that business, and no other. It has acquired two building estates, one at Norbury and another at Hither Green, and in the course of its business it has developed these estates by making roads, laying down sewers and drains, and building houses thereon. Sometimes the company sells the houses it has built for cash. In those cases, the price received by the company for the house is brought

into the company's accounts as a trading receipt, and the cost of the house is set against that as a trading expense. No difficulty or question arises with regard to those cases. In other cases, however, the appellant company disposes of the houses it has built by granting, in consideration of a premium, a lease for 99 years, subject to the payment of an annual ground rent. In some cases the ground rent is £9 15s., in others it is £10 10s. The lease imposes upon the lessee the covenants which are usual in such instruments, including, of course, a covenant to pay the ground rent. The question which falls to be decided in this case is how the matter ought to be treated in the assessment to income tax when the company has disposed of a house in that way. A

Before the Special Commissioners, the contention was put forward on behalf of the appellant company that, in these cases, the premium received on the granting of the lease and the ground rent reserved thereby constituted profits arising to the company from the ownership of land in respect of which the company was taxable only under Sched. A, C and should be excluded entirely from any assessment under Sched. D. This contention was based upon a decision of the Supreme Court of the Irish Free State (as it then was) in *Birch v. Delaney* (1). That decision appears to me to justify the contention put forward before the Special Commissioners. The facts in that case were that a builder, Mr. Delaney, D took on lease a plot of ground for a term of years, subject to a ground rent. On this plot he built several houses, which he sold. The sale of the houses was effected by way of sub-demise for a term of years, subject to a ground rent in each case. He also received a sum of money in each case by way of a fine, or premium. The Supreme Court, reversing E the judgment of the High Court (HANNA and O'BYRNE, JJ.), decided that Mr. Delaney was not liable to be assessed under Sched. D either in respect of the premiums or in respect of the ground rents. The judgment of the Supreme Court was delivered by FITZGIBBON, J. I have considered carefully the judgments delivered in that case, and I have come F to the same conclusion as that of the Special Commissioners—namely, that the judgments of HANNA and O'BYRNE, JJ., in the High Court are to be preferred to the judgment of FITZGIBBON, J., in the Supreme Court. As it seems to me, and I say so with respect, FITZGIBBON, J., G misapprehended the effect of the decision of the House of Lords in *Fry v. Salisbury House Estate, Ltd.* (2). However that may be, it is sufficient for the purposes of this case to say that no such contention as that which was put before the Special Commissioners was put before this court. H Mr. Latter, on behalf of the appellant company, conceded that, in a case where a speculative builder disposes of a house by means of a long lease, the premium received in consideration of the granting of that lease must be brought, as a trading receipt, into his trading account for the purposes of assessment to income tax. He also conceded that the ground rents must in some form or other be brought into the trading account as a trading receipt.

For the Crown, it is contended that the ground rent—or, as I should prefer to call it, and, I think more correctly, the reversion expectant on the determination of the lease—should appear in the trading account at its market value. For the company, however, it is said that the reversion ought to appear, not at its market value, but at its cost. The question on which the commissioners desire the opinion of the court is as to which of those contentions is right. Ought the freehold reversion to appear in the trading account at its realisable value or at cost?

In the case of a company which is carrying on the business of a speculative builder, the land it buys, the roads it makes and the houses it builds—things which would be “capital” in other kinds of business—are its “stock-in-trade,” and appear at cost in its trading account until the houses are sold. The argument for the appellant company in this case is, as I understand it, this. Before the grant of the long lease of a house, the company was the absolute owner of the house, and the house would then appear in the trading account at cost. By granting the lease, the company has divided that ownership into two things—namely, the lease and the reversion. The reversion, says Mr. Latter, remains part of its stock-in-trade, and, in accordance with the general rule, must be put at cost in the trading account. The first criticism which occurs to one on that argument is that the ownership of a freehold reversion does not seem to be any part of the business of a speculative builder. If that be the correct view, then the argument that there should be entered into the trading account a receipt representing the cost of the freehold reversion falls to the ground. Secondly, in cases where stock-in-trade is taken in a trading account at cost, the actual cost of the stock can be ascertained by investigating the accounts of the company. The appellant company, however, did not buy any freehold reversion, and there is nothing in the books which would enable anyone to say what was the “cost” of any such reversion in the ordinary sense of that word, though I was told that the company’s accountant had suggested several ways in which an estimate of the supposed “cost” of a freehold reversion could be made.

Whether those arguments are sound or unsound, so far as I am concerned, it appears to me that this case is concluded by the decision of the House of Lords in *Emery (John) & Sons v. Inland Revenue Comrs.* (3), a case which came from Scotland. In that case, a firm of builders acquired certain land upon which they erected dwelling-houses. In a number of cases they created ground annuals over the houses and the ground attached to them, and thereafter sold the houses and ground for a cash payment, subject to the ground annuals, which they retained in their possession. It appears that what is called in Scotland a ground annual corresponds to what is called in our law a rentcharge. When the builders sold the houses subject to the ground annuals, they parted with all their interest in the houses and land attached thereto. The question arose in

that case as to whether, when a house was sold subject to a ground annual, something should appear in the assessment to income tax as a trading receipt in respect of the ground annual. The House of Lords held that the realisable value of the ground annuals created and retained by the builders should be added to the amount of the trading receipts for the purposes of ascertaining the amount of their trading profits chargeable to income tax. As it seems to me, that case covers the present one. It is quite true that there is a distinction between the cases, in that in the Scottish case the speculative builders, when they sold a house subject to the ground annual, parted with all their interest in it, whereas in this case the speculative builder has parted with his right to possess the land for no more than 99 years, and at the end of 99 years will, pursuant to the terms of the lease, be entitled to repossess the property. Nevertheless, I do not think, after reading the opinions delivered in the House of Lords, that that is a distinction which affects the matter I have to determine here. The basis of the decision of the House of Lords was that the ground annuals were readily saleable—there was an open market for property of that description—and that, for the purpose of ascertaining the profits made by the speculative builder in the year in question, they must be included in the account at their market value. An assessment to income tax under Sched. D is for the purpose of ascertaining the profit which a trader has made in the particular year for which the assessment is made. In this case before me, as in the case of the ground annuals, the ground rents, as they are called in the case—or the reversions expectant on the determination of the leases, as I prefer to call them—are readily saleable, and their realisable value can be ascertained without any difficulty at all.

The Special Commissioners decided that the correct method of dealing with these transactions in the company's accounts was to bring in as receipts from sales the amount of the premiums plus the realisable value of the ground rents at the date of the transactions. In my view, the decision of the Special Commissioners was right, and the case must, therefore, go back to them, to ascertain that value. It was said by Mr. Latter that, although it is true that the value of the reversion at the date when the lease was granted can be readily ascertained, yet it is a hardship that the speculative builder should be treated as having received that value when in fact he has not sold the reversion and may not sell it for years to come, and may then perhaps find that the market value has gone down, owing to a change in the value of money. That is a hardship which he can avoid, of course, by selling the reversion at once. If he is not minded to do that, and chooses to keep the reversion in his own hands, he is really speculating, not in houses, but in reversions, a different class of business altogether. It seems to me, as I have already said, that a speculative builder who, in consideration of a premium, grants a long lease at a ground rent and retains the reversion in his own hands is left with a form of property which

cannot be described as part of his stock-in-trade. Therefore, in my opinion, this appeal fails.

Appeal dismissed with costs.

Solicitors: *Royds, Rawstorne & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

Re SANGER, TAYLOR v. NORTH.

[CHANCERY DIVISION (Simonds, J.), November 4, 17, 1938.]

Executors—Order of application of assets—Lapsed share of residue—Duties to be discharged out of testator's estate—Whether direction sufficient to displace statutory order—Administration of Estates Act, 1925 (c. 23), s. 34 (3), Sched. I, Part II.

The will of the testatrix, who died on June 20, 1936, after providing for the payment of certain pecuniary legacies, directed the executors to divide the proceeds of the estate equally among five legatees. The will contained the following clause: "I direct that all duties payable on my death shall be discharged out of my estate." Two of the five legatees having predeceased the testatrix, and their shares having lapsed, the question arose, *inter alia*, whether the estate duty on the testatrix's personal estate, the legacy duty on the lapsed legacies, and the legacy duty on the residuary estate, including the lapsed legacies, were payable out of the lapsed shares or out of the estate as a whole before division into shares:—

HELD: all these duties were payable out of the lapsed shares as to which the testatrix died intestate, and the direction in the will did not vary the order of application of assets contained in the Administration of Estates Act, 1925, Sched. I, Pt. II.

[EDITORIAL NOTE.] Upon the question of the order in which assets are applicable to the payment of funeral and testamentary expenses and debts, the general rule is that the statutory provisions are to take effect subject to the intention of the testator expressed with reasonable clearness in the will. The question here is whether or not there was a provision in the will sufficient to displace the statutory order. In this connection, the judge has found it difficult to reconcile the decisions upon this matter since 1925, but comes to the conclusion that the terms of the will are not sufficient to vary the statutory order.

AS TO ORDER OF APPLICATION OF ASSETS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 375-377, para. 704; and FOR CASES, see DIGEST, Supp., Executors and Administrators, Nos. 5908a-5919a.]

Cases referred to:

- (1) *Re Lamb, Vipond v. Lamb*, [1929] 1 Ch. 722; Digest Supp.; 98 L.J.Ch. 305; 141 L.T. 60.
- (2) *Re Petty, Holliday v. Petty*, [1929] 1 Ch. 726; Digest Supp.; 98 L.J.Ch. 207; 141 L.T. 31.
- (3) *Re Atkinson, Webster v. Walter*, [1930] 1 Ch. 47; Digest Supp.; 99 L.J.Ch. 35; 142 L.T. 129.
- (4) *Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268; Digest Supp.; 99 L.J.Ch. 107; 142 L.T. 111.
- (5) *Re Tong, Hilton v. Bradbury*, [1931] 1 Ch. 202; Digest Supp.; 100 L.J.Ch. 132; 144 L.T. 260; affg. [1930] 2 Ch. 400.

(6) *Re Worthington, Nichols v. Hart*, [1933] Ch. 771; Digest Supp.; 102 L.J.Ch. 273; 149 L.T. 296.

ORIGINATING SUMMONS to determine whether all or any, and, if so, which, of the following payments to be made in administering the estate of the testatrix, Eva Sanger, are chargeable to the two fifth shares of her estate as to which she died intestate or are chargeable to her estate as a whole before division thereof into shares—namely, (a) the pecuniary legacies bequeathed by her will and codicils, (b) the estate duty payable on her estate (other than estate duty payable on her real estate), (c) the legacy duties payable on the legacies, (d) the legacy duty payable on the residuary estate, including the lapsed shares therein, and (e) her funeral and testamentary expenses (other than estate duty) and administration expenses and debts. A

A. H. Droop for the executor.

E. Milner Holland for two of the legatees, Mrs. Julia C. North and Miss Marian Skinner. B

Hon. B. L. Bathurst for another legatee, Miss Minnie Gilbert. C

H. O. Danckwerts for Mr. Frederick Pullum, representing the testatrix's next of kin.

SIMONDS, J.: Eva Sanger made her last will on Nov. 24, 1927, and, having by cl. 2 thereof appointed executors, by cl. 3 bequeathed certain pecuniary legacies, and by cll. 4 and 5 bequeathed certain annuities, in cl. 6 proceeded as follows: D

As to all the rest residue and remainder of my real and personal estates whatsoever and wheresoever situate and over which I have any power of appointment I devise and bequeath the same equally among the following persons. . . . E

Five persons were then named. Then by cl. 7 the testatrix directed that all duties payable on her death should be discharged out of her estate. The testatrix made two codicils to her will, and thereby gave certain pecuniary legacies which she expressed to be free of duty. She died on June 20, 1936. Two of the five persons named as residuary legatees predeceased her, so that two fifth shares of residue were undisposed of, and devolve as upon an intestacy. Such shares are "property undisposed of by will" within the Administration of Estates Act, 1925, Sched. I, Pt. II (1), and, therefore, under sect. 34 (3) of the Act, are primarily applicable, "subject to the provisions contained in the will," towards the discharge of the funeral, testamentary and administration expenses and debts and liabilities of the testatrix. F

The question raised in this summons is whether there are any provisions in the will which alter the order of administration which would otherwise apply under the Act. In form, the summons asks: G

Whether all or any and which of the following payments to be made in administering the testatrix's estate are chargeable to the two fifth shares of the testatrix's estate as to which she died intestate or are chargeable to the testatrix's estate as a whole before division thereof into shares, namely (a) the pecuniary legacies bequeathed by the said will and codicils, (b) the estate duty payable on the testa- H

trix's estate (other than estate duty payable on the testatrix's real estate), (c) the legacy duties payable on the said legacies, (d) the legacy duty payable on the residuary estate including the lapsed shares therein, and (e) the testatrix's funeral and testamentary expenses (other than estate duty) and administration expenses and debts.

- The argument before me, however, was directed only to items (b), (c) and (d), it being conceded that there was no provision of the will affecting the primary liability of the undisposed-of shares to payment of the items (a) and (e). This means that, upon the direction contained in cl. 7 of the will, and upon that alone, reliance is placed by those who argue in favour of some order other than that prescribed by the Act.
- Whether or not the argument is well-founded must depend upon the construction of the language of this particular will, but I cannot ignore the cases in which, since the coming into operation of the Administration of Estates Act, 1925, a similar question has been considered, and I therefore propose in the first place briefly to examine those cases.
- In *Re Lamb, Vipond v. Lamb* (1), according to the statement of the will by EVE, J., the testator, after appointing executors and directing that all his just debts, funeral and testamentary expenses should be paid by them as soon as possible after his decease, and after making a specific devise and bequeathing several pecuniary legacies, directed that the rest, residue and remainder, real and personal, whatsoever and wheresoever, should be equally divided between his brother, his cousin and his two nephews therein mentioned. Upon this will, the substantial question for the decision of EVE, J., was whether or not the lapsed share of residue was property of the deceased undisposed of by will within Sched. I, Pt. II (1) of the Act. He decided that it was, and his decision, which was affirmed in a later case in the Court of Appeal, is open to revision only in the highest tribunal. However, EVE, J., went on to say, at p. 725 :

In the present case, I can see nothing to exclude the application of the statutory order of application. . . .

- That is to say, a direction to executors to pay debts and funeral and testamentary expenses as soon as possible after his decease, and a bequest of pecuniary legacies followed by a disposition of the rest, residue and remainder of the estate did not amount to a provision in the will which would affect the statutory order.
- In *Re Petty, Holliday v. Petty* (2), ASTBURY, J., considered and distinguished the case last cited. There the testator, by cl. 17 of his will, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses except as therein mentioned, and debts and the pecuniary legacies bequeathed by the will or any codicil thereto and all duties payable in respect of all annuities, legacies and other gifts, given free from duty, and by cl. 18 the testator directed his trustees to stand possessed of the residue of the said moneys in trust to divide the same into equal parts and to pay one equal half-part to his wife and to hold the other half-part upon trust for certain persons

therein named. The testator's wife predeceased him, and the same question arose as that which arose in *Re Lamb, Vipond v. Lamb* (1)—namely, whether the testator's funeral and testamentary expenses, etc., were payable out of the wife's share which lapsed, or whether there was some provision of the will which affected the statutory order. Upon this point, ASTBURY, J., said, at p. 730 :

I cannot believe that the statute intended to interfere with the testator's right to deal with his own estate as he liked. Here it is plain that he created a mixed fund for the payment of funeral and testamentary expenses debts and legacies, and there was no undisposed of moiety of the balance of residue until those expenses and debts were ascertained and paid. In those circumstances the estate must be administered according to the testator's directions, and the expenses and debts are not thrown primarily on the lapsed moiety.

Both in the passage cited and in a subsequent passage in his judgment, ASTBURY, J., finds in the express creation of a mixed trust with a direction to pay thereout funeral and testamentary expenses, etc., a provision which overrides the statutory order of application.

In *Re Atkinson, Webster v. Walter* (3), a similar question came before CLAUSON, J. In that case, the testator devised his real estate to his brother therein named, and bequeathed all his personal estate to trustees upon trust for sale and conversion, and upon trust that they should, out of the moneys produced by such sale and conversion and any ready money, pay his funeral and testamentary expenses, etc., and stand possessed of the income of the moneys upon trust for the several persons therein mentioned. The testator's brother Edwin predeceased him, so that the real estate was undisposed of, and the question was whether, being property of the deceased undisposed of by will, it must be first applied in the payment of funeral and testamentary expenses, etc., or whether there was some provision in the will to the contrary. CLAUSON, J., following *Re Petty, Holliday v. Petty* (2), and distinguishing *Re Lamb, Vipond v. Lamb* (1), said, at p. 51 :

Here the will contains a clear direction to the trustees to convert the personal estate and out of the moneys produced by such conversion to pay his funeral and testamentary expenses and debts : until that provision is worked out there is no necessity to have recourse to Sched. I, Pt. II, to the Act.

The statutory order of application was, therefore, ousted by the provisions of the will, and did not apply in that case.

In *Re Kempthorne, Charles v. Kempthorne* (4), the testator devised to his brother all his freehold and copyhold property, and further provided (at p. 269) :

As to all my leasehold property, and all my personal estate and effects, including my stocks and shares, and all money due to me on debentures and mortgages, of or to which I shall be possessed or entitled at the time of my death, subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto, and the duty on any legacies bequeathed free of duty, the same shall be divided into seven equal parts, and I bequeath the same as follows. . . .

Some of those to whom the bequests were made predeceased him, so that their shares lapsed. It appears that the will did not contain an express trust for sale. MAUGHAM, J., upon the consideration of this will,

came to the conclusion that the statutory order of application prevailed. To some extent, no doubt, he relied upon certain provisions of Sched. I, Pt. II, of the Act, which the Court of Appeal considered not to be material. The Court of Appeal reversed his decision, holding that the provisions of the will altered the statutory order. LAWRENCE, L.J., while
A expressing himself as unconvinced as to the correctness of the decision in *Re Lamb, Vipond v. Lamb* (1), distinguished that case, saying that the provision there as to the debts, funeral and testamentary expenses amounted in effect to nothing more than a direction to pay them in the due course of administration, and that was no such express provision
B as occurred in the will then under consideration. RUSSELL, L.J., said that the first thing to do was to ascertain whether the testator's will contained any, and, if so, what, provisions relating to the discharge of his funeral, testamentary and administration expenses, debts and liabilities, and that the testator, in that case, had made, as it appeared
C to him, a particularly clear provision by his will. RUSSELL, L.J., did not refer to *Re Lamb, Vipond v. Lamb* (1). The difference between the two cases appears to be that in *Re Lamb, Vipond v. Lamb* (1) the testator directed his executors to pay his debts, funeral and testamentary expenses, etc., without specifying out of what estate or fund the payment
D was to be made, and bequeathed legacies, and then disposed of the rest, residue and remainder of his estate, while in *Re Kempthorne, Charles v. Kempthorne* (4) the testator directed that his estate should, after payment thereof of his funeral and testamentary expenses, etc., be divided into a number of equal parts which he bequeathed as therein mentioned.
E In *Re Kempthorne, Charles v. Kempthorne* (4), there was an overriding provision. In *Re Lamb, Vipond v. Lamb* (1), there was not.

Next comes *Re Tong, Hilton v. Bradbury* (5), in which both CLAUSON, J., and the Court of Appeal held that the statutory order prevailed in regard to the only items upon which a decision was sought. In that case, the
F testator, after directing his executors to pay all legacies free of estate or legacy duty, and after directing that any duty of any kind which might become payable on any gifts he might make upon his decease should be paid out of his estate, bequeathed certain legacies and annuities and certain specific bequests, and then directed his executors to collect
G the income from the remainder of his estate and pay 75 per cent. of it to his sister during her life, and, subject thereto, to dispose of the estate as therein mentioned. The gift to the testator's sister lapsed, because the will had been attested by her husband, and the question was whether
H or not the undisposed-of share of income was the primary fund for the discharge of funeral, testamentary and administration expenses, etc., other than the duties in regard to which specific directions had been given. It is noteworthy that the question was not raised whether the last-named duties should be paid out of the undisposed-of share. It appears to have been assumed in both courts that they were not so payable, though there was nothing to displace the statutory order in

regard to them except the direction for payment of them out of the estate and a disposition of the remainder of the estate. CLAUSON, J., said, at p. 405 :

In this will I find no reference to funeral expenses or to debts or liabilities ; there is a direction to pay duty on gifts made by the testator in his lifetime, but these would not be debts or liabilities of the testator, but of the recipients of the gifts, and the direction amounts to a legacy to those recipients of a sum equal to the duty which they have incurred. I find a direction to pay all legacies free of estate duty, and I think I may fairly construe this as a direction that all estate duty shall be paid out of his estate. When I come to the final gift I find a disposition of the "remainder of my estate." This I construe, in view of the preceding reference to estate duty, as a direction to pay the estate duty and the legacies out of the general estate before ascertaining the fund which is the subject-matter of the final gift ; but I can find no direction dealing with funeral, testamentary and administration expenses, debts and liabilities, other than and except this estate duty. In order to ascertain how these expenses, debts and liabilities must be met I must, by reason of sect 34 (3) of the Act turn to Sched. I, Pt. II.

The same view was taken in the Court of Appeal. To LORD HANWORTH, M.R., it appeared that the rule of *expressio unius est exclusio alterius* must apply. The testator had imposed specific duties on the executors. The word "remainder" could not be treated as an indication that not only the specific duties and liabilities but also all other duties, expenses and liabilities were to be paid out of residue. ROMER, L.J., referred to the specific directions to the executors, but failed to find anything in the will amounting to an indication of the testator's intention that the funeral and testamentary expenses and debts generally should be paid in any other than the statutory order. He then uses these words, at p. 212 :

Even if the testator had directed his executors to pay all his funeral and testamentary expenses and debts and then given the remainder of his estate on certain trusts, I should still have hesitated to say that this amounted to an indication that the expenses and debts were to be paid in any other order out of the assets than that provided for in Sched. I. The truth of the matter is that there is nothing in this Act which prevents or is intended to prevent executors from paying expenses, debts and liabilities out of the first assets coming to their hands available for the purpose ; and Sched. I, Pt. II, really only deals with the ultimate adjustment of the burden as between the parties becoming entitled to the testator's estate. Therefore, the use of such a word as "remainder" does not seem to me to make any difference. Such words throw no light on how as between the persons having beneficial interests in the remainder the liability for expenses and debts is to be apportioned.

EVE, J., agreed, saying that he could not help thinking that, by indicating certain respects in which departure was to be made from the statutory order of application of the assets, the testator indicated clearly that, except in respect of the payment of those particular liabilities, the scheduled order of application was to be adhered to. I have cited at length a passage from the judgment of ROMER, L.J., because, though it might be regarded as a *dictum* in that case, it was approved, and indeed formed the basis of the judgment of LORD HANWORTH, M.R., in the next and last case to which I must refer, *Re Worthington, Nichols v. Hart* (6). In that case, the testatrix, after appointing an executor and bequeathing a number of pecuniary legacies, etc., free of legacy duty, gave, devised and bequeathed all the remainder of her estate, both real and personal, to two persons in equal shares. One of them pre-

deceased the testatrix, and the familiar question arose whether the debts, funeral and testamentary expenses and the legacies should, in the first place, be paid out of the lapsed share. BENNETT, J., held (i) that the debts, funeral and testamentary expenses were primarily payable out of the lapsed share, but (ii) that the legacies and duties thereon were payable out of the general estate before shares of residue were ascertained. Upon the second point, his decision was reversed by the Court of Appeal. LORD HANWORTH, M.R., said, at p. 775 :

But the provisions of the statute indicate that unless there is some provision in the will which negatives the prescribed order of administration, that order of administration must apply both to legacies and to debts. The learned judge seems to have thought that because of the specific reference to legacies in the will there was an indication of an intention that the statutory order of administration should not apply to them. But, after all, if legacies are given by a will, there must be a specific reference to them, and I do not see how that can be sufficient to alter the statutory order of administration.

He then referred, with approval, to the passage from the judgment of ROMER, L.J., in *Re Tong, Hilton v. Bradbury* (5), which I have read. LAWRENCE, L.J., concurred, expressing his agreement with the cited passage, as did ROMER, L.J.

I do not find it easy to reconcile the several cases that I have cited. The question being whether or not there is a provision in the will which displaces the statutory order, I see no difference in that regard as between (a) a bequest of legacies *simpliciter* and (b) a direction to executors to pay legacies, nor between (a) a direction to pay legacies and (b) a direction to pay debts. Yet in *Re Worthington, Nichols v. Hart* (6) the bequest of legacies, followed by a disposition of the remainder of the estate, was inadequate to displace the statutory order, while in *Re Tong, Hilton v. Bradbury* (5) it appears to have been conceded that, in regard to those duties as to which specific directions for payment were given, the statutory order was displaced, and the specific directions in regard to some items of payment were made the substantial ground for upholding the statutory order in regard to other payments. Again, I find it difficult to distinguish between, on the one hand, a gift of property subject to, and after, payment of funeral and testamentary expenses or debts or legacies, and, on the other hand, a direction to pay funeral and testamentary expenses or debts or legacies followed by a gift of residue. Yet in *Re Kempthorne, Charles v. Kempthorne* (4) the statutory order was displaced by a direction of the former kind, and in *Re Tong, Hilton v. Bradbury* (5) and *Re Worthington, Nichols v. Hart* (6) it was not displaced by a direction of the latter kind. It is perhaps significant that at least one member of the court which decided *Re Kempthorne, Charles v. Kempthorne* (4) appeared to doubt the correctness of the decision in *Re Lamb, Vipond v. Lamb* (1), even upon the assumption, which must now be accepted, that a lapsed share of residue is "property of the deceased undisposed of by will." However, the correctness of that decision could not be questioned in the light of the decision of the Court of Appeal in *Re Worthington, Nichols v. Hart* (6).

In the present case, I have a bequest of legacies and annuities without any direction for the payment either of them or of any testamentary expenses and debts, followed by a gift of residue. If the will ended there, the case would be so near *Re Worthington, Nichols v. Hart* (6) that I should follow that case without question, but the will then contains the direction that all duties payable on the testator's death shall be payable out of his estate. If I gave to that direction the effect that was given to a substantially similar direction in *Re Tong, Hilton v. Bradbury* (5), I should have to say that it was a provision which overrides the statutory order. I do not think that I can do so, for in *Re Tong, Hilton v. Bradbury* (5) the actual decision was only in regard to those items as to which the testator had given no direction. It did not expressly cover the items as to which a specific direction was given, and, though in all the judgments in both courts that specific direction was referred to, and in greater or less degree made a ground for not displacing the order in regard to the items as to which no specific direction was given, I cannot but think that, if the question had been expressly raised in regard to the specific items, the court must, consistently with the observations of ROMER, L.J., which I have cited at length, and the later decision in *Re Worthington, Nichols v. Hart* (6), have held that in regard to these items also the statutory order was not displaced.

Re Kempthorne, Charles v. Kempthorne (4) may be distinguished on the ground, perhaps not altogether satisfactory, that a different effect may be given to a testator's language according to whether he (a) directs payment of debts and distribution of residue, or (b) directs distribution of his estate subject to, and after, payment of debts. The present case falls within the former, not the latter, category. In the result, the conclusion to which I come is that the statutory order is applicable, and that the undisposed-of share of residue is the fund which must first be used in discharge of all the items of payment mentioned in the summons.

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the legatee Miss Marian Skinner); *Taylor & Humbert* (for all other parties).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

A. L. STURGE & CO. v. EXCESS INSURANCE CO., LTD. G

[KING'S BENCH DIVISION (Branson, J.), November 9, 10, 11, 14, 15, 1938.]

Insurance—Guarantee policy—Guarantee of payment of bonds—Bonds containing gold clause—Guarantee of redemption at par—Whether insurance of payment on a gold basis. H

The claimants effected policies of insurance in relation to bonds issued by provinces of the Dominion of Canada containing a gold clause and an option to claim payment either in Canadian or in United States dollars. Payments were made upon surrender of coupons or bearer bonds, and payment had been made in paper dollars. No claim had been made for any larger payment. The claimants later alleged that there

was an obligation under the gold clause to pay the gold value of each coupon or bond, and that, by reason of the issuers having paid less than that amount, they had suffered a loss within the indemnity under the policy issued by the respondents. Under one form of such policy, the insurers guaranteed to the insured the redemption of the principal at par and the full payment of the dividends. Under the other form, the insurers guaranteed to make good to the insured 50 per cent. of such sum or sums as the issuers might fail to pay in cash in compliance with their obligations in respect of principal and interest:—

HELD: the terms of the bonds could not be read into the policies, and, therefore, the claimants had suffered no loss within the terms of the policy, and were, therefore, not entitled to any payment thereunder.

[EDITORIAL NOTE. The contention here is that the terms of the bonds should be read into the policies, and thus incorporate the gold clause in the guarantee given by the policies. The guarantee, however, contained in the policies was a guarantee of the redemption at par, and this is held to be contrary to the inclusion of the gold clause in the policies.

AS TO INSURANCE OF DEBTS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 510-513, paras. 795-802; and FOR CASES, see DIGEST, Vol. 29, pp. 411-413, Nos. 3233-3243.]

Case referred to:

(1) *Diederichsen v. Farquharson Brothers*, [1898] 1 Q.B. 150; 17 Digest 267, 796; 67 L.J.Q.B. 103; 77 L.T. 543.

APPEAL by way of special case from an award by A. T. MILLER, K.C., in an arbitration in which A. L. Sturge & Co. and others were claimants and the Excess Insurance Co., Ltd., and others were respondents. The relevant facts are fully set out in the judgment.

Philip Vos, K.C., and *A. S. Wilson* for the appellants.

F. R. Evershed, K.C., and *J. F. F. Platts Mills* for the respondents.

BRANSON, J.: It is sufficient for the purposes of my judgment to state the following facts. Each of the claimants at various times between the end of Sept., 1932, and June 5, 1933, effected policies with one or more of the respondents in relation to bonds or debentures issued by provinces of the Dominion of Canada and other issuing bodies. All these bonds and debentures contained what are known as gold clauses, and gave the holder the option to claim payment either in Canadian or in United States dollars. Every payment of interest or principal was made against surrender on behalf of the claimant concerned to the bond-issuer of the relative interest coupon or bearer bond. The sum paid and accepted in each case was in paper dollars, Canadian or American, of the number of dollars (and cents, if any) specified in the coupon or bond. In no case was any claim for a larger payment made by or on behalf of the claimant concerned. The claimants, however, now contend that the obligation of the issuers of the bonds was in each case what has come to be called a "Feist" obligation—namely, an obligation to pay by way of principal or interest as many Canadian or United States paper dollars as would represent the gold value of the nominal amount of each respectively—and that, by reason of the issuers having paid less than that

number of dollars, the claimants have suffered losses against which they are entitled to be indemnified by the respondents under the policies. The respondents' first contention in answer is that, on their true construction, the policies of insurance in suit were contracts to indemnify the claimants against losses incurred by reason of the failure of the bond-issuers to pay on the respective due dates mentioned in the policies the sums of United States dollars likewise so mentioned for principal or interest. The respondents also relied upon a number of alternative contentions in the event of its being held that their first contention was not correct. In view of the length and complexity of the arguments which would have been involved had it become necessary to go into those alternative contentions, and in view of the fact that some of them have already been argued before, and are awaiting the decision of, the House of Lords, I decided to confine the argument before me to the question of the construction of the policies, unless and until I should be persuaded that the interpretation put upon them by the arbitrator was wrong.

I turn, then, to the policies to consider the language used therein. Broadly, they fall into two classes which were designated as Class A and Class B. It appears that there are some minor differences in individual policies of each of the two classes *inter se*, but, except in one instance, my attention was not drawn to those differences, nor was I asked to hold, any more than the arbitrator was asked to hold, that any such differences affected the interpretation to be put on the policies. This is in accordance with the statement in the statement of agreed facts :

For the purpose of this arbitration all the policies in Class A may be treated as identical ; similarly with the policies comprised in Class B.

The policy attached to the award as a specimen of those in Form A was issued by the Trade Indemnity Co., Ltd. Under it the company agrees (subject to the conditions set out below) :

... to guarantee to the insured ... the redemption of the principal at par not later than July 15, 1934, on stock bonds specified in the schedule below. The company also guarantees full payment of the dividends upon the said stock bonds at the rate of interest and upon the dates due as stated in the schedule.

Then follows the schedule, containing, under the heading *Particulars*, " Bonds New Brunswick 5 per cent. Stock." The numbers of 10 bonds of \$1,000 each were added by indorsement. Then there are the words " Due July 15, 1934," and, under the heading *Sum insured*, "\$10,000 United States." Lower down, there appear the dates and amounts of the dividends at $2\frac{1}{2}$ per cent. and the number of dollars of each dividend respectively. Principal and interest are then added together and stated as "\$10,750 United States." There follow the words :

Hereto \$5,375 United States part of \$10,750 United States principal and interest of each and every of the above-mentioned bonds and dividends.

It was argued for the claimants that the proper way in which to construe

the policy was first to regard the terms of the specified bonds as if set out in the policy, then, because the bonds contain a gold clause, to construe the words "the redemption of the principal at par" as meaning "the discharge of the gold clause obligation in full," and, finally, to construe the words "Sum insured \$10,000 United States," or, when interest is added, "\$10,750," as a limitation of the liability of the insurers, and not as a statement of the number of United States dollars payment of which redemption of the bonds at par entailed. It is plain beyond argument that the words "sum insured" cannot be construed in this policy as limiting the liability of the insurers to \$10,750 United States because the clause commencing with the word "Hereto" limits that liability to \$5,375 United States. Some other meaning, then, must be given to the words and figures in the schedule. No authority could be adduced for the proposition that the court should treat the bonds referred to as set out in the policy. *Diederichsen v. Farquharson Brothers* (1), to which reference was made, is, if it be material at all (which I think it is not), rather an authority to the contrary. The words "at par," when used in relation to the redemption or purchase of a bond or of stock, have a simple and well-recognised meaning—namely, "at its nominal value," as distinguished from "at a premium," on the one hand, and "at a discount," on the other. The language of the policy appears to me to specify for the purposes of the policy the amount involved in the redemption of the principal at par as being \$10,000 United States in respect of the 10 bonds, and to guarantee in respect of each of the 10 bonds payment of half the amount of any shortage below that figure—that is, "Hereto \$5,375 United States part of \$10,750 United States . . ." In other words, the policy upon its true construction says: "We guarantee you against failure of the issuers to redeem the bonds at par, *videlicet*, by payment of \$1,000 United States." The provisions as to interest follow exactly the same line, and reinforce the above argument as to the principal.

The policy attached to the special case as an example of Form B was issued by the Atlas Insurance Co., Ltd. It recites that A. L. Sturge & Co. are the holders of the stock specified in the schedule, and the company agrees:

. . . to make good to the insured 50 per cent. of such sum or sums as the government of British Columbia may fail to pay in cash in compliance with its obligations in respect of the insured's aforesaid holding in respect of (a) payment of interest at the rate and upon the dates due as stated in the schedule and (b) the principal sum payable on the maturity of the said stock as stated in the schedule.

This policy speaks in the schedule of the "sum insured" as \$21,500 United States. Here again it is impossible to give that phrase the meaning contended for by the claimants. The rest of the policy (apart from the words in the top right-hand corner, "Sum insured \$10,750 United States," which do not appear in the other Atlas policy produced, and which, therefore, it is safer to disregard) makes it quite clear that the figure "\$21,500 United States" is not inserted in the schedule to measure

the limit of the respondents' liability. This is done by the last sentence of the schedule in the words :

This company's share being 50 per cent. of each of the above-mentioned bonds and dividends or \$10,750 United States in all.

The language used in the witnessing clause of this policy shows quite unambiguously, to my mind, that the failure contemplated therein is a failure by the government to pay in cash in compliance with its obligations, as stated in the schedule to the policy—that is to say, to pay on the bonds by Aug. 15, 1934, \$20,000 United States, and, in respect of interest, \$500 United States on each of the 3 days named. I see no reason for confining the words “as stated in the schedule” to the dates stated therein, and not reading them as applying also to the amounts stated therein. For these reasons, I agree with the arbitrator in holding that the respondents' first contention in para. 29 (1) of the case is correct, and that the claimants are not entitled to any payment under the policies. This is the effect of the award and determination set out in para. 38 of the special case, and, consequently, this appeal must be dismissed.

I have endeavoured, whilst considering the true construction of the policies, to exclude from my mind all the findings of the award as to the negotiations which led up to the issuing of them, and as to the desires or intentions of the parties in the matter, because I think that, if there be any ambiguity in the policies, it is patent rather than latent. I confess, however, to a feeling of some satisfaction that my decision so arrived at does, according to the findings of the arbitrator, give to each claimant the insurance which he desired, and no less, and impose upon each of the respondents the risk which they intended to cover, and thought they were covering, and no more.

In these circumstances, the other question of construction argued before me—namely, whether in any event the policies covered cases where the assured, instead of claiming payment in United States dollars, asked for and received payment in Canadian dollars—becomes immaterial. However, as it was argued, and as I understand that the claimants would like to know my view upon it, I proceed to deal with it. The question can only arise if one goes outside the four corners of the policies and looks at the bonds, for there is nothing in the policies to suggest that the bonds provide for payment in anything but United States dollars. I have already held that it would be wrong, in construing the policies, to read into them any provisions of the bonds, but, supposing, for the sake of this argument, that it is legitimate to do so, I still think that the arbitrator was right in holding that the policies are not applicable to cases where the insured never asked for the United States dollars, non-payment of which was insured against, but asked for and obtained Canadian dollars, which are nowhere mentioned in the policies. The mere fact that an option to claim payment in either Canadian or United States dollars is contained in the bonds shows that it was contemplated that

payment in one rather than in the other might be more advantageous to the bondholder. If so, it follows that the loss sustained by the bondholder through non-payment in the one might be greater than that which would arise from non-payment in the other. It is impossible, therefore, in my opinion, to treat the difference between claiming Canadian dollars and claiming United States dollars as material, and to hold that the words of the policy providing for the case of non-payment of United States dollars can be extended to cover non-payment of Canadian dollars.

Appeal dismissed.

Solicitors: *William Charles Crocker* (for the appellants); *Linklaters & Paines* (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

BRITON FERRY STEEL CO., LTD. v. BARRY.

[KING'S BENCH DIVISION (Macnaghten, J.), November 3, 4, 1938.]

Income Tax—Trade—Succession to trade—Division of manufacture—One process carried on by subsidiary companies—Remaining process carried on by parent company—Sales effected by another subsidiary company—Merger of manufacturing companies but not of selling company—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 11 (2).

The appellant company until 1934 was mainly concerned with the manufacture of steel bars, and the conversion of these bars into black-plate and tinplate was carried out by subsidiary companies. The whole share capital of these subsidiary companies was owned by the appellant company. Another subsidiary company carried through the sale to buyers of plates of the plates manufactured by the subsidiary companies. In 1934, the subsidiary manufacturing companies were wound up, the whole of their undertakings being transferred to the appellant company, and thereafter the appellant company sold plates through the selling company as before. The appellant company was then assessed in respect of a new trade under Sched. D, Cases I and II, r. 11 (2). It was contended that, as the appellant company, through the selling subsidiary company, was possessed of, and controlled, the means of outlet of the production of the subsidiary company, there was no goodwill or trade connections to which the appellant company could succeed:—

HELD: the appellant company had succeeded to the trade of the subsidiary companies, and the assessment was rightly made.

Laycock v. Freeman, Hardy & Willis, Ltd. (1) distinguished.

[EDITORIAL NOTE.] This case is distinguished from that of *Laycock v. Freeman, Hardy & Willis, Ltd.* (1) by reason of the fact that there a wholesale manufacturing business ceased, and the parent company, after the reconstruction, carried on a retail manufacturing business. In the present case, the selling company, although a subsidiary of the appellant company, has to be treated in law as a separate entity, and, therefore, the appellant company is not concerned with the selling of the manufactured article. It is, therefore, said that, after the reconstruction, the appellant company carried on, in addition to its former trade, the precise trade carried on by the subsidiary companies.

AS TO SUCCESSION TO A BUSINESS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 111-113, para. 209; and FOR CASES, see DIGEST, Vol. 28, pp. 40-42, Nos. 208-214.]

Case referred to :

- (1) *Laycock v. Freeman, Hardy & Willis, Ltd.*, [1938] 2 K.B. 836 ; [1938] 3 All E.R. 571 ; Digest Supp.

CASE STATED by the Commissioners for the Special Purposes of Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The Briton Ferry Steel Co., Ltd., was incorporated in 1899. Down to 1934, the main business of the company was the production of steel bars, which were supplied to subsidiary companies and other consumers for conversion into blackplates and/or tinplates. At one of its works the company carried out the process of converting steel bars into blackplate. For a number of years, the company owned the entire share capital of the following subsidiary companies : Aberavon Tinplate Co., Ltd., Ferry Tinplate Co., Ltd., Ffrwdwyllt Tinplate Co., Ltd., Resolven Tinplate Co., Ltd., and Morriston Tinplate Co., Ltd. The business of the subsidiary companies was the manufacture of blackplate and tinplate. Tinplate is produced by applying a coating of tin to blackplate, and the manufacture of blackplate and that of tinplate have always been so closely allied as to be considered in the industry as one and the same business, the markets for, and the consumers of, the two products being practically the same. As stated, the subsidiary companies purchased from the company the necessary supplies of steel bars and rolled these into blackplates. They then converted the blackplates into tinplates by the process referred to above.

From 1924 to 1931, the subsidiary companies were members of the South Wales Tinplate Corporation, Ltd., which purchased the whole of their output for re-sale. In May, 1931, the subsidiary companies withdrew from the corporation for economic reasons, and it became necessary for the company to set up a new sales organisation.

On May 28, 1931, a company was formed by the company under the name of the Briton Ferry Steel & Tinplate Agency, Ltd., with a capital of £500, the whole of which was held by the company. The directors of the agency were directors of the company, and two managing directors were appointed. From May, 1931, until Apr. 7, 1934, the course of business was as follows. The agency found the purchasers of tinplate. The agency had no list of customers who had been in the habit of dealing with the corporation, and had to work up its trade connection from the start. Having found a purchaser for tinplate, the agency in its discretion selected the works of such one or more of the subsidiary companies as was best suited to produce goods to the purchaser's specification to carry out the work, and gave instructions to those works accordingly. All contracts for sale of these goods were made by the agency as principal. The agency also made contracts of sale of blackplates and tinplates produced by persons other than the subsidiary companies, and in these cases the contracts took the same form as that of contracts for the sale of plates produced by the subsidiary companies. All purchasers of plates

produced by the subsidiary companies were found by the agency, the subsidiary companies having no dealings with purchasers, and the agency was entirely responsible for finding outlets for the production of the subsidiary companies. Very rarely, an intending purchaser would approach a subsidiary company, but, if he did, he would be referred to the agency.

In May, 1931, the subsidiary companies possessed certain trade marks attached to their individual places of manufacture, and goods manufactured by a subsidiary company would be marked with its trade mark. In the course of business as stated above, however, the trade marks ceased to be so used. That is to say, they were not used as applied to a particular place of manufacture, but were used as applied to a particular product—namely, tinplate. The agency used the marks indiscriminately, so that a mark belonging to one subsidiary company was, on the instructions of the agency, applied to the product of the place of manufacture of another subsidiary company, and instances were proved to us where this had been done in relation to sales made by the agency of tinplate produced by a subsidiary company and sold by the agency in the manner stated above. The trade marks had come to be regarded by the trade as marks or brands of the agency, and as associated with its goods. The agency contract forms, invoices and letter-papers were headed with the name and address of the agency company, described as “Sales Office for the Briton Ferry Steel Co., Ltd., proprietors of,” followed by the names of the subsidiary companies, and, while it was known that the goods were manufactured by the subsidiaries, customers had no knowledge as to which particular subsidiary produced the goods they bought. It was only very rarely that a customer would ask for the product of a particular subsidiary company.

As a result of the course of business followed, a barrier had been put up by the purchaser and the subsidiary companies. There was no benefit derived from a connection with customers which the company acquired from the subsidiary companies by virtue of the operations to which reference will shortly be made. Without the aid of the organisation of the agency, it would not have been possible for the liquidator of the subsidiary companies to have carried on the businesses of the subsidiary companies. The agency accounted for the proceeds of sale of the tinplate to the subsidiary companies, deducting a selling commission.

The merchanting account represents the purchases and sales of black-plates and tinplates acquired by the agency from sources other than the subsidiary companies. The balance of this account is carried to the profit and loss account, which includes an item to credit in respect of the commission recoverable by the agency from the subsidiary companies on sale by the agency of products of the subsidiary companies, as above stated.

In pursuance of a scheme of re-organisation, all the subsidiary companies went into liquidation on Apr. 7, 1934. On the same day, an

agreement was entered into between the liquidator of each subsidiary company and the company which in terms provided for the transfer to the company of the subsidiary company's assets, including the undertaking, business and goodwill. Each agreement was in the same form.

After Apr. 7, 1934, the mills of the subsidiary companies became branch mills of, and were operated by, the company. Sales continued to be made through the agency. A

The assessments under appeal were made upon the footing (a) that the company had succeeded to a trade carried on by each subsidiary up to Apr. 7, 1934, within the meaning of the Finance Act, 1926, s. 32 (2), or, in the alternative, (b) that the company had set up and commenced a new trade on that date, and that, accordingly, there should be included in the company's assessable profits the actual profits for the periods to Mar. 30, 1935 and 1936, derived from each of the mills formerly carried on by subsidiary companies. On behalf of the respondent, the assessments were supported on both of these grounds, but we held that they could not be supported on the second and alternative ground. B

On behalf of the company, it was contended (i) that the company had not succeeded to any trade or trades within the Finance Act, 1926, s. 32 (2), (ii) that at Apr. 7, 1934, the company—which then controlled the subsidiary companies and the agency—was already possessed of and controlled the means of outlet of the production—and, therefore, the profit-making capacity—of the subsidiary companies, which had no goodwill or trade connections capable of transfer to the company, (iii) that at no relevant time were the subsidiary companies carrying on any trade or trades which could be separated from the trade of manufacturing and selling blackplate and tinplate carried on by the company through the subsidiary companies and the agency, (iv) that, in order to constitute a succession within the section, it was necessary that the successor should acquire from a predecessor, who ceased to carry it on, a trade previously carried on by the predecessor, and that that was not so in this case, (v) that what the company did acquire under the agreements of Apr. 7, 1934, was not a number of trades, but only certain physical assets of, and debts due to, the subsidiary companies, subject to discharge of their liabilities, and (vi) that the assessments were erroneous and excessive, in that they should not include the profits of the subsidiary companies for the years in question. C

On behalf of the respondent, it was contended (i) that each subsidiary company carried on the trade of manufacturing plates and selling them to customers through the agency, (ii) that, by the agreements of Apr. 7, 1934, the benefit of the trade carried on by each subsidiary company was transferred to the company, (iii) that the company in fact succeeded to the trade of each subsidiary, and (iv) that the assessments were correct in principle. D

The commissioners decided as follows :

From 1931, the subsidiary companies found an outlet for their products through E

the agency company, which was controlled by the parent company. In our opinion, each subsidiary company had something more than mere physical assets to dispose of—namely, a trade capable of being succeeded to by the parent company, and which was in fact succeeded to by the parent company.

Cyril King, K.C., and F. Grant for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondent.

MACNAGHTEN, J.: The appellant company was incorporated in 1899, and down to 1934 the main business of the company was the production of steel bars. Steel bars are the raw material out of which blackplate and tinplate are manufactured. The steel bars are rolled into blackplate, and tinplate is produced by applying a coating of tin to the blackplate. The case states that :

... the manufacture of blackplate and tinplate has always been so closely allied as to be considered in the industry as one and the same business, the markets for and the consumers of the two products being practically the same.

At one of its works the appellant company carried on the process of converting steel bars into blackplates, but it had never made tinplate before 1934.

For a number of years, however, the company owned the entire share capital of five companies, which carried on the business of making blackplate and tinplate out of steel bars supplied to them by the appellant company. Those five companies were the Aberavon Tinplate Co., Ltd., the Ferry Tinplate Co., Ltd., the Ffrwdwyllt Tinplate Co., Ltd., the Resolven Tinplate Co., Ltd., and the Morriston Tinplate Co., Ltd. From 1924 to 1931, the subsidiary companies were members of the South Wales Tinplate Corporation, Ltd., which purchased the whole of their output for re-sale, but in May, 1931, they withdrew from that corporation, and the appellant company then formed a new company called the Briton Ferry Steel and Tinplate Agency, Ltd., with a capital of £500, the whole of which was held by the appellant company. The directors of the agency were directors of the appellant company, and two managing directors were appointed. From May, 1931, until Apr. 7, 1934, the agency found for the five subsidiary companies the purchasers of their products. The agency treated the five subsidiary companies very much as if they were one concern. The case states that :

Having found a purchaser for tinplate, the agency in its discretion selected the works of such one or more of the [five] subsidiary companies as was best suited to produce goods to the purchaser's specification, and gave instructions to those works accordingly. All contracts for sale of these goods were made by the agency as principal. The agency also made contracts of sale of blackplates and tinplates produced by persons other than the [five] subsidiary companies, and in these cases the contracts took the same form as contracts for sale of plates produced by the subsidiary companies.

All purchasers of plates produced by the subsidiary companies were found by the agency, the subsidiary companies having no dealings with purchasers, and the agency was entirely responsible for finding outlets for the production of the subsidiary companies.

In pursuance of a scheme of reorganisation, on Apr. 7, 1934, all five subsidiary companies went into voluntary liquidation, and on the same

day the liquidator made agreements with the appellant company for the transfer to the appellant company of the whole of the undertaking—the business and goodwill—of each of the subsidiary companies. Everything that each of the subsidiary companies possessed—lands, buildings, stock, plant, machinery, goodwill—was transferred on that date to the appellant company, and thereafter the appellant company, having become the owner of the mills of the subsidiary companies, continued to operate the mills, to produce tinsplate made from the steel bars supplied by the appellant company, and to dispose of those tinsplates through the agency, just in the same way as the subsidiary companies had disposed of them before their liquidation.

In those circumstances, the inspector of taxes alleged that the appellant company was to be assessed in respect of a new trade, under the Income Tax Act, 1918, Sched. D, Cases I and II, r. 11 (2), which, by the Finance Act, 1926, was substituted for the rule contained in the former Act. The relevant words of the substituted rule are :

If at any time after the said Apr. 5 [1928] any person succeeds to any trade . . . which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies [it is conceded that this is not a case to which para. (1) applies] the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade . . . at that time. . . .

The words “succeeds to any trade” in that rule obviously bear the meaning that some person not only acquires a trade, but also that he continues to carry it on, since it is the trade carried on by him after he has acquired it which is to be assessed. The present case seems, at first sight, to fall exactly within the rule. These five subsidiary companies carried on the business of the manufacture of tinsplate. The appellant company supplied them with the raw material out of which the tinsplate was made, but before Apr. 7, 1934, the appellant company had never made any tinsplate. The appellant company acquired the trade of making tinsplate which the subsidiaries had carried on before, and, having acquired it, continued to carry on the trade.

The ground on which it was contended before the commissioners that the appellant company had not succeeded to any trade within the meaning of the Finance Act, 1926, s. 32 (2), was that at Apr. 7, 1934, the appellant company was already possessed of, and controlled, the means of outlet of the production (and, therefore, the profit-making capacity) of the subsidiary companies, which had no goodwill or trade connections capable of transfer to the company. That contention seems to be based upon the assumption, inadmissible for this purpose, that the agency company which came into existence on May 28, 1931, was the same as the appellant company. It was, in fact and in law, a separate legal entity, carrying on a separate business. If there was any binding agreement between the agency company and the subsidiary companies whereby the agency company was under an obligation to find purchasers for the products of the five subsidiary companies, then the appellant

company, by virtue of the agreements made by the liquidator, became possessed of that right. If there was no agreement—and, in view of the fact that the agency company was a subsidiary of the appellant company, there was no need for such an agreement—then, so far as their relations with the agency were concerned, all that the subsidiary companies had to sell was the prospect, such as it might be, that the agency would continue to do in the future what it had done in the past without any legal obligation to do so—namely, find purchasers for the tinplate produced by the appellants as successors of the five subsidiary companies.

I listened with great interest to the arguments of Mr. Cyril King, but I confess that I was unable to apprehend how it could be said that the fact that the product of the subsidiary companies was disposed of by another subsidiary of the appellant company could take the case out of the plain words of r. 11 (2) set out in the Finance Act, 1926, s. 32.

The remaining contentions before the commissioners were, I think, substantially the same—they were based on the same point—and need not be considered. Mr. King desired to supplement those contentions, however, by a new contention which he said would have been put forward if a certain case, to which I will refer in a moment, had been decided at the time, a case which has recently been decided by LAWRENCE, J.—namely, *Laycock v. Freeman, Hardy & Willis, Ltd.* (1). Mr. King said that, in view of the decision in that case, he desired to raise the further contention that, on the facts as stated in the case, the trade of the five subsidiaries ceased on Apr. 7, 1934. I am told that *Laycock v. Freeman, Hardy & Willis, Ltd.* (1) is proceeding to the Court of Appeal, and, if I thought that it had a bearing on the case before me, it might be proper to defer my decision in this case. In my view, however, for the reasons I am about to give, *Laycock v. Freeman, Hardy & Willis, Ltd.* (1) has no bearing on the case before me now. Freeman, Hardy & Willis, Ltd., are the well-known vendors of boots and shoes. They carry on a very large retail trade in shops scattered all over the country. They were the parents of two subsidiary companies which manufactured the boots and shoes, owning all the shares in those companies, and they took the whole of their output and sold it in their shops. In Apr., 1935, Freeman, Hardy & Willis, Ltd., were minded to put an end to these subsidiaries and take over their business and assets themselves, and they did just as the appellant company in this case did. The subsidiary companies were wound up, their assets were all transferred to Freeman, Hardy & Willis, Ltd., and, just as in this case, the business went on as before. The factories where boots and shoes were made continued, and the product of those factories was sold in the shops of Freeman, Hardy & Willis, Ltd. At first sight, it looked as if it also was a simple case, and that Freeman, Hardy & Willis, Ltd., had succeeded to the trade of their subsidiaries. It was argued, however, that, although it was quite true that Freeman, Hardy & Willis, Ltd., had never manufactured a boot or a shoe before 1936, and that their trade was the sale of boots and

shoes by retail, and although it was true that, after the acquisition of the property of the subsidiary companies, the boots and shoes were manufactured and sold just as before, nevertheless the trade of the subsidiaries had ceased, and for the reason that, whereas before the amalgamation it had been a trade of manufacturing boots and shoes for sale by wholesale, it had by the amalgamation been converted into a trade of manufacturing of boots and shoes for sale by retail, and therefore the trade of manufacturing boots and shoes for sale by wholesale had ceased. The judge, upholding the decision of the commissioners in that case, held that there had been no succession within the meaning of the relevant rule. As Mr. Hills pointed out, that case is not analogous to this one. It would have been analogous if the subsidiaries of Freeman, Hardy & Willis, Ltd., had bought all the leather out of which they made their boots and shoes from one source, and if the leather-maker had acquired the business of the subsidiaries and had then carried it on. In this case, however, the trade of these five subsidiary companies cannot be said to have come to an end. It plainly did not. It went on exactly as before, and, therefore, I do not think that *Laycock v. Freeman, Hardy & Willis, Ltd.* (1) touches the matter. No other case was cited to me which would throw doubt upon what seems to be the plain result of the facts as stated in the case. In my opinion, therefore, the Special Commissioners came to a right conclusion in the matter, and the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Ingledeew, Sons & Brown*, agents for *Crawfords*, Swansea (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

SIMONS v. SIMONS.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge), November 4, 9, 1938.]

Conflict of Laws—Divorce—Decree of divorce by Massachusetts court not the court of the domicile—Order for maintenance added to decree—Whether order for maintenance enforceable in England.

The plaintiff and her husband and their four children lived in Cornwall until 1912, when the husband went to Boston, U.S.A., leaving the wife and children in this country. He returned to England in 1914, but went to America again in 1916. In 1923, upon his providing the necessary money, the wife and three of the children joined the husband in Boston, the fourth child being then in the British Air Force. Unfortunately, differences arose between the spouses, with the result that the court of Massachusetts in 1924 granted a decree of divorce, and ordered maintenance to be paid at the rate of \$14 per week. In 1926 the husband returned to England, and in 1928 he sold the house in Cornwall which had been the joint property of himself and his wife. The husband stated in evidence that he had no intention of making a permanent home in the United States of America. No payment

having been made for 12 years under the order for maintenance, the wife issued the writ in this action on Jan. 26, 1937, claiming to enforce the order for maintenance of the Massachusetts court and payment of arrears of such maintenance. As to the arrears, it was conceded that the claim must be confined to the 6 years preceding the issue of the writ :—

HELD : (i) the husband had always had an *animus revertendi*, and had not acquired a domicile of choice, but retained his domicile of origin, which was English.

(ii) the decree of divorce, not being that of the court of the domicile, was invalid in England.

(iii) since the court in Massachusetts had no jurisdiction to decree divorce, it had no jurisdiction to order maintenance, and the action failed.

[EDITORIAL NOTE. The question of jurisdiction in divorce is, of course, well settled, but this would seem to be the first occasion on which the question of enforcing an order for alimony and maintenance has directly arisen for decision. It is held that the order for maintenance is consequential upon the decree of divorce, and that, therefore, if there is no jurisdiction in divorce, there is no jurisdiction to order maintenance.

AS TO ENFORCING FOREIGN ORDERS FOR MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 6, p. 329, para. 384 ; and FOR CASES, see DIGEST, Vol. 11, pp. 444-446, Nos. 1034-1044.]

Cases referred to :

- (1) *Re Craignish, Craignish v. Hewitt*, [1892] 3 Ch. 180 ; 11 Digest 331, 205 ; 67 L.T. 689.
- (2) *Beatty v. Beatty*, [1924] 1 K.B. 807 ; Digest Supp. ; 93 L.J.K.B. 750 ; 131 L.T. 226.
- (3) *Re Macartney, Macfarlane v. Macartney*, [1921] 1 Ch. 522 ; 11 Digest 454, 1113 ; 90 L.J.Ch. 314 ; 124 L.T. 658.
- (4) *Papadopoulos v. Papadopoulos*, [1930] P. 55 ; Digest Supp. ; 99 L.J.P. 1 ; 142 L.T. 237.
- (5) *Roach v. Garvan* (1748), 1 Ves. Sen. 157 ; 28 Digest 293, 1494.

ACTION by a wife to enforce against her husband an order made by the Probate Court of the state of Massachusetts, dated Aug. 20, 1924, for maintenance at the rate of \$14 per week. By her writ the wife claimed arrears of maintenance from May 21, 1926, to Jan. 26, 1937, the date of the writ. Her counsel, however, conceded that she could not claim for more than 6 years. The amount was agreed at £987 2s. 9d. The facts are fully set out in the judgment.

H. M. Pratt for the plaintiff.

J. Lhind Pratt for the defendant.

H. M. Pratt : The order for payment of maintenance to the wife and children is a final judgment *in personam*. The court has found as a fact that the parties were domiciled in Massachusetts. The husband had been resident in the United States for 10 years, and had a business there. He was before the court, and had submitted to its jurisdiction. For 2 years from the date of the decree, he had obeyed the order. He then returned to England. *Re Macartney, Macfarlane v. Macartney* (3) is authority for the proposition that an order for maintenance is a judgment *in personam*;

J. L. Pratt : In fact, the parties were not domiciled in the United States. The defendant had never given up his intention of ultimately returning to England. The position is quite different from the position in *Beatty's* case (2), where the parties were domiciled in the United States. The decree of the court must be taken as a whole, and cannot be split up so as to be in part enforceable and in part not. If a matrimonial court assumes a jurisdiction which it has not got to grant a divorce, an order based on the divorce cannot be enforced here, even though it be a judgment *in personam*. In *Macartney's* case (3), *ASTBURY, J.*, said, at p. 532 :

The claimant contends that the judgment is a judgment *in rem* and therefore enforceable. The declaration as to paternity determines the status of the child and is clearly *in rem*, but so far as the judgment imposes any obligation on the assets to meet the £75 a year maintenance, it is, notwithstanding its language, a mere judgment *in personam* against the curator appointed to represent the estate. It may be operative against assets in Malta, and nothing I have said will interfere with that. But it is unenforceable against assets in the possession of the legal personal representative here. As regards the maintenance awarded it is at most a judgment *in personam*, and in no sense a judgment *in rem*. There is therefore no debt enforceable against the testator's assets here, and the claim must be disallowed.

GODDARD, L.J. : In this case, no evidence was called on behalf of the plaintiff, except the evidence of a lawyer from New York, a member of the New York bar, who I am satisfied is clearly competent to speak as to the laws of the state of Massachusetts. That is all the oral testimony called on her behalf. Then, in addition to that, the plaintiff put in the judgment, or rather the order, of the court on which she sues, and no point was taken that that was not duly and properly proved. She also put in certain interrogatories. Then evidence was given in this case by the defendant himself.

The facts, as I find them, are these. The defendant is the son of Cornish people, and lived in Cornwall down to 1912. He was married, and he had 4 children, all of whom in 1912 were under age. He had a small business, which I gather was in the nature of a tobacco and sweet-shop business, at Penzance, and, finding that things, as he put it, were "not too good"—which, I suppose, means that they were very bad—he went out in 1912 to Boston, where he worked, not on his own account, but for an employer. He left his wife and children in this country. In 1914 he returned to this country, and he worked both at London and at Gravesend. He worked here for 2 years, and seems to have returned to Boston in 1916, where again he worked for the same employer. About 1923, he sent over money to his wife so that she and the children might come over to Boston. By this time, he was working, not for an employer, but for himself, having acquired some garage business with his brother. He sent over this money to his wife, and she sold the furniture, which was obviously the sensible thing to do. She might have been going over for good. I do not know. She was obviously going over for a long time, however, and it would not be worth while to store the furniture for several years. She sold the furniture and

let the house. That house, being the joint property of the husband and wife, was not sold. She took over three of the children, the eldest boy by this time being in the British Air Force in England, and joined the husband in Boston. Differences very soon arose. I suppose the fact that the spouses had been separated for so long did not make for harmony. Although she only got out there some time in the autumn of 1923, by 1924 she was petitioning for divorce. It is only fair to the plaintiff to say that her husband does not seem to have done his best to make her happy. She alleged cruelty, and her real complaint seems to have been neglect on the part of the husband to provide her with suitable maintenance. I am not concerned with what the grounds of her petition were, but she evidently desired to be free of her husband. Her husband equally desired to be free of her, and he cross-petitioned for divorce. The result was that the court of Massachusetts gave the wife a decree and ordered payment of maintenance at the rate of \$14 per week—a substantial sum, of course—for the maintenance of the wife and her infant children. It will be noticed that there is no division of this sum of \$14 per week, and that it is all payable to the wife, although no doubt, as indeed the order shows, the court ordered that sum because they took into account the fact that the wife had infant children. The husband paid for some 2 years under that order, and then he returned to this country. Whether or not he would have returned to this country then had it not been for this order against him I do not know. I should think that probably he would not have done so. In fact, he was quite frank about it. His explanation was that indeed by this time—that is to say, in 1926—his wife and family were all at work, or the children were employed and they gave their money to their mother. He said that their income was bigger than his own, and, the children having sided with their mother, I suppose that he thought that, in the circumstances, there was no reason why he should support them, and he returned to this country, where, as he thought, the order of the Massachusetts court could not reach him. He has sworn, however, that he never intended to make Boston or Massachusetts or the United States his permanent home, and, therefore, he did not sell the house, which had all this time remained the joint property of himself and his wife. It therefore looks as if he had an *animus revertendi*. He did not sell that house until 1929. Again, it is only fair to him to say that, when he did sell the house, he accounted to his wife for half the profit from the sale. To complete the history before I come to the law, for 12 years this woman never applied to her husband for maintenance. Then she issued a writ against him and sought to recover those arrears for which she had never until then asked. It is a claim for nearly £1,000 on a man who is obviously in humble circumstances. During that period she never approached her husband or asked for maintenance, and she must have known his address because of the sale of this house and his accounting to her for the profit and so on. That leads me to believe, from this

long silence and from her failure to take any steps to recover this money, that she was not seeking for maintenance. Also, of course, the husband could apply to the court in Massachusetts to get the amount of the maintenance or alimony reduced, because the children by this time had all grown up. Thus, I do not think that the merits of her action are very conspicuous. However, that is not a matter with which I am A really concerned.

The first thing that she had to do, in my judgment, was to show that the divorce was a valid divorce. In my opinion, she entirely failed to prove that her husband was domiciled in the state of Massachusetts. She gave no evidence about it at all except that she had got a divorce B there—a feature that is present in all these cases where the question arises as to the validity in this country of a divorce granted by a foreign court—and that her husband had sent for her and the children to go out and join him. A person who undertakes to prove that another person has abandoned his domicile of origin and has acquired a new domicile C of choice undertakes no inconsiderable burden. The books on the subject show how frequently the courts have held that that burden has not been discharged. It has sometimes happened that the person himself has set it up, but it is more often done by his executors, because these questions more often arise with regard to the effect of taxing D statutes on an estate, and it is the executors who have consequently set up the change of domicile. Mr. J. L. Pratt has said—and he has cited a case heard before CHITTY, J., *Re Craignish, Craignish v. Hewitt* (1)—that it is sufficient to rely on the evidence of the man when he says: “I never intended to change my domicile.” I do not suppose that he E put it in that way, because I do not suppose that the man knew the difference between domicile and residence, but what he means is that he always had intended to return. The plaintiff could have given evidence about it. If she did not wish to come to this country, she could have had her evidence taken on commission. She could have F given evidence to show why she went out there, what her husband told her to induce her to go out, what declarations her husband made when he was there, what her husband had told her when he was over here in 1916, what state of affairs she found when she got out there, and how it was that the home was broken up. She might have proved a G great many things. She has proved none of them, and has given no evidence at all, and I think that it would be quite wrong to hold, merely because the husband sent for his wife, which is what any man does in those circumstances, that that conclusively establishes his domicile. Nor am I impressed by the fact that both parties in this case petitioned H for divorce. These people, of course, do not understand the difference between domicile and residence in fact, and I venture to think that very few laymen do. They think that, if they get a divorce in America, that divorce is valid in this country. The truth of the matter is that, if both these spouses wanted to get rid of each other, the last thing

A they would do, if they knew anything about the matter, would be to bring to the notice of the court anything which would show the court that it had no jurisdiction. What has been proved in this case is this. It has been proved by Mr. Kelly—who, as I say, I find to be an expert on the laws of the state of Massachusetts, and who knows the state of the law—that the order that was made would be regarded in the state of Massachusetts as a final order both as to the decree of divorce and as to the order for payment of alimony or maintenance. As this case may go higher, this is a fact that I must find: he also proved that, according to the law of the state of Massachusetts, there is a distinction in that state, as there is in all the states, between residence and domicile. The law of the state of Massachusetts, however, is the same as the law of this country—namely, that the court only assumes the divorce valid if the people who have got the divorce have a domicile in its state. Of course, just the same thing may happen there as may happen here. C If the two persons appear to be domiciled here, in the sense that they are living here, and have been living here for some time, and the attention of the court is not directed to the fact that they are American citizens—it is not suggested here that Mr. Simons ever became an American citizen—the court may pronounce a decree, no doubt basing D that on the assumption that the parties are domiciled here, although it may turn out that they are not. Meanwhile, as I have said, Mr. Simons had always at all material times, in common with his wife, a house in England. He did not sell it until 3 years after he returned to this country. In those circumstances, I am quite sure that it would be E wrong for me to hold that Mr. Simons was domiciled in America. At any rate, it is for the plaintiff to prove it, and she has quite failed to prove to my satisfaction that her husband was domiciled there at the time of the divorce. The consequence is that, both by the law of F Massachusetts and by the law of this country, the court of Massachusetts had no jurisdiction to pronounce a decree of divorce, and, whether Mr. Simons appreciates it or not, according to the law of this country he is still married to his wife. It may well be that in Massachusetts, now that the decree is made absolute, the law there will regard G Mr. Simons as being divorced from his wife. That is to say, if he married again out there, he would not be guilty of the offence of bigamy. In this country, we take the view that domicile alone will confer jurisdiction on the court to grant a divorce, and, therefore, this decree is a nullity in this country.

H Mr. H. M. Pratt has argued that, so far as the order for the payment of maintenance is concerned, that remained as a good judgment in *personam* granted by the court to the jurisdiction of which they submitted, as indeed they did, and that, therefore, he can enforce the order for maintenance in this court. Of course, he is relying upon *Beatty v. Beatty* (2), which goes to show that these orders made in America, unlike the orders made by the Divorce Court in England, are final judgments,

and therefore there is no question of the jurisdiction of the court to make the order. They can be enforced in this court. *Beatty v. Beatty* (2) was a case of two American citizens who had been divorced by order of the court of the state of New York. That court had made an order for maintenance, and that could be enforced as a final order in this country. Mr. Pratt has also referred me to *Re Macartney, Macfarlane v. A Macartney* (3), in which an order had been made by a court in Malta determining a question as to the maintenance of a child. As I understand that judgment, it awarded perpetual maintenance of the child against the father and the estate. It was afterwards sought to enforce that judgment as a debt from the father and the estate against the B assets in England in an administration. I need not go through the whole of that case, for a variety of reasons, mainly upon the ground that I think it would be contrary to the policy of English law to make a decree for the perpetual maintenance of the child against the father. That was regarded as being against public policy. For a variety of C reasons, ASTBURY, J., as I say, refused to give effect to that judgment and to admit the proof in the administration. It is true that he did describe—and, if I may say so, perfectly correctly describe—the order as a judgment *in personam*, but he was not there considering the question that I have to consider here, because no one doubted that in the courts of D Malta the order made was not a perfectly valid order, so far as jurisdiction was concerned. The court of Malta had power to make the order that it did, but, when it came to the question of enforcing it against the assets in England, there arose different considerations, with which I am not troubled in this case. As ASTBURY, J., pointed E out, the order for payment of the money would very likely be enforced in Malta. So, too, here it may well be that the order for alimony can be enforced in Massachusetts. Where a court, however, has assumed a jurisdiction to decree a divorce which neither according to its own law nor according to the law of this country it in fact has jurisdiction to F do, it is assuming jurisdiction in fact that it has not got, then it seems to me that an order which it makes consequent upon that assumption of jurisdiction, even if it is an order *in personam*, must go, and must suffer the same fate as that of the rest of the decree. The court orders maintenance only because it has ordered a divorce. In other words, G it has assumed a jurisdiction to decree a divorce, and, consequent upon that assumption of jurisdiction, it has made a consequential order that the divorced husband should support his former wife. If it had not assumed jurisdiction, if for any reason it had refused the prayer in the decree, it would follow that the order for maintenance could never H have been made.

I adjourned this case at the last hearing to see if there were any authorities bearing on the matter, and it seems to me that the view I then formed, and the view I have just expressed, is not only supported by *Papadopoulos v. Papadopoulos* (4), but is exactly in accordance with

that judgment, which is binding on me sitting in this court because it is a judgment of the Divisional Court. It is true that *Papadopoulos v. Papadopoulos* (4) was a case of nullity. I will deal with the distinction between nullity and divorce for the purposes of this case in a moment or two. It was a case in which the court in Cyprus had declared a marriage void. The headnote, in setting out the facts, states :

Later, on proceedings by the wife in a Cypriot court the marriage was declared null on the same ground by consent of the parties, and it was further declared that the husband should pay the wife a lump sum in satisfaction of all claims, including maintenance.

Thus, the court there was pronouncing on two matters, one *in rem*, the other *in personam*. It declared the marriage null, and it ordered a lump sum for maintenance. The wife afterwards brought proceedings before the justices in this country to obtain an order for maintenance against the husband. The husband said that the decree of nullity had been obtained, and the Divisional Court held that the court in Malta had no jurisdiction to decree nullity, and, consequently, that the order for maintenance was as void as was the order decreeing nullity. That is how I read that judgment. LORD MERRIVALE, P., in a judgment which I need not read, deals very fully with the whole situation, but the point was most succinctly put by HILL, J., at p. 69 :

In the present case the husband contends that he was excused [from maintaining his wife] first by the decree of the District Court of Nicosia and, secondly, by the agreement between husband and wife embodied in that decree. As to the first argument, in the proceedings before it the court was not a court of competent jurisdiction to make a decree as to maintenance. Its powers as to maintenance were the same as the powers of the High Court of Justice. Having no power to declare the marriage null and void, it had no power to make an order for maintenance consequential upon a decree of nullity. It had no power to make a decree of dissolution and did not purport to do so, neither did it purport to make a decree of restitution of conjugal rights or of judicial separation, and therefore it had not the power to make an order for maintenance consequential thereon.

It seems to me that, if the court in Massachusetts had no power to grant a decree of divorce, it had no power and no jurisdiction to order maintenance, which it could order only if it decreed a divorce. Mr. H. M. Pratt, for the plaintiff, has argued that the case of *Papadopoulos* (4) is quite different from this case because that case depended upon the constitution of the court. I may say at once that I do not myself see the difference. I do not see that that matters, because, if the court has no jurisdiction, it seems to me that it matters not whether the lack of jurisdiction arises from the constitution of the court—that is to say, from the fact that the court was acting I suppose in excess of its jurisdiction, assuming a jurisdiction that it did not possess—or whether it arises from any other ground. As I understand the decision in *Papadopoulos*' case (4), the reason why the court had no jurisdiction in that case was that the question as to whether or not the marriage was a valid marriage was a question of English law, which had to be decided in the English courts, and not in the court of Cyprus. The ground upon which

the appellant in *Papadopoulos*' case (4) had disputed the validity of the marriage was this. LORD MERRIVALE, P., says, at p. 62 :

The ground of repudiation is an assertion that he was at the time a member of the Greek church and that the marriage of members of the Greek church in Cyprus could only be effectually solemnised in a church in the presence of a priest. It is unnecessary to consider what proof would establish such a contention in an English court. In Cyprus it appears to have been believed. The matter did not arise before the learned magistrate and it was not raised here.

Then, as he points out, that matter is a matter which the husband can raise, the reason, I think, being that the question as to the validity of the marriage on the ground of a proper or improper solemnisation depends upon the law of the place where the marriage is solemnised. If the marriage is duly solemnised in England between two persons who have contracted a marriage, and it is solemnised in manner provided by English law, then, of course, the marriage is a good marriage. As I understand it, the difference between jurisdiction to grant a decree of nullity and jurisdiction to grant a decree of divorce is that, where it is a question as to the due celebration of the marriage, the courts of the country in which the marriage was celebrated can pronounce upon that. If the marriage has not been duly celebrated—that is to say, celebrated in accordance with the laws of that place—it can pronounce the marriage null and void, although the parties were not domiciled there. For instance, it was decided as long ago as 1748 by LORD HARDWICKE, L.C., in *Roach v. Garvan* (5) that, where an Englishman contracted a marriage in France which the French courts held to be null and void because of undue celebration, or for similar reasons, the courts of this country would pay regard to the decisions of the courts of France on that subject, because the law of France is the proper law to apply to the marriage. One knows that the expression "proper law" as defined by Professor Dicey and by other writers upon the conflict of laws means the law which regulates the matter, and the proper law which regulates the celebration of a marriage is the law of the place where the marriage is celebrated. If a man goes to France and is married according to the forms prescribed by French law, he contracts a marriage which is valid there, although he is domiciled in England. On the other hand, if he contracts a marriage, and does not contract it according to the forms prescribed by French law, then the marriage is not valid. That is what was decided in *Roach v. Garvan* (5), but I do not think that that has any application to what I have to decide here in this case. That was a question as to whether or not the court had power to grant a decree of nullity, and I have to consider whether the court can decree nullity as distinct from a dissolution of marriage. Where the question is one of dissolution of marriage, then the parties must be domiciled within the jurisdiction of the court which purports to grant the decree. I think that this case of *Papadopoulos* (4) shows that, where a decree is made—and I care not whether it is a dissolution of marriage or a decree of nullity—and it is made without jurisdiction, the order for maintenance goes with the order for

the decree of nullity. With due respect to the argument to which I have listened, it seems to me that that is only common sense. If the main order goes, then any order which is merely ancillary to that order should go with it. When I say order, I mean judgment—the judgment for alimony. The court of Massachusetts would never have made a decree for alimony, or maintenance, whatever is the proper description by which to call it in American law, if it had not made the decree of divorce. Therefore, as that decree of divorce is invalid in this country according to English law, it seems to me to follow that the decree of maintenance must also be invalid, one thing being ancillary to the other. For these reasons, I am of opinion that the action fails, and must be dismissed with costs.

Action dismissed with costs.

Solicitors : *Torr & Co.*, agents for *Borlase & Venning*, Penzance (for the plaintiff) ; *Attenboroughs* (for the defendant).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

WILLIAMS v. WILLIAMS.

[LIVERPOOL AUTUMN ASSIZES (Croom-Johnson, J.), **November 7, 1938.**]

Divorce—Desertion—Original desertion followed by imprisonment—No return after release.

In Sept., 1934, the respondent left the petitioner in circumstances which clearly constituted desertion. In Jan., 1935, he was sentenced to 3 years' penal servitude. He was released in July, 1937, but did not return to the petitioner. The petition was for divorce on the ground of desertion for more than 3 years immediately preceding the presentation of the petition :—

HELD : as the husband left the wife, clearly intending to desert her, before he was imprisoned, and did not return to her upon his release, desertion was proved for the necessary statutory period.

[EDITORIAL NOTE.] Recent cases have considered the interruption of desertion by entering into separation agreements, and also by presenting a petition in the divorce court. The present case considers another form of interruption, which places it out of a man's power to be with his wife. The previous cases here cited were, of course, decided before the 1937 Act, and indeed the matter has not been considered by the courts for a long period of years.

AS TO DESERTION AND IMPRISONMENT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-656, para. 964 ; and FOR CASES, see DIGEST, Vol. 27, p. 319, Nos. 2974, 2975.]

Cases referred to :

- (1) *Townsend v. Townsend* (1873), L.R. 3 P. & D. 129 ; 27 Digest 311, 2892 ; 42 L.J.P. & M. 71 ; 29 L.T. 254.
- (2) *Astrope v. Astrope* (1859), 29 L.J.P. & M. 27 ; 27 Digest 319, 2974.
- (3) *Drew v. Drew* (1888), 13 P.D. 97 ; 27 Digest 319, 2975 ; 57 L.J.P. 64 ; 58 L.T. 923.
- (4) *Wynne v. Wynne*, [1898] P. 18 ; 27 Digest 310, 2879 ; 67 L.J.P. 5 ; *subsequent proceedings*, 78 L.T. 796.
- (5) *Parker v. Parker*, [1926] S.C. 574 ; Digest Supp.

UNDEFENDED PETITION by wife for divorce on the ground of desertion. It appeared that the respondent, who did not appear, left her in Sept., 1934. In Jan., 1935, he was sentenced to 3 years' penal servitude for housebreaking. He was released from prison in July, 1937, and did not return to the petitioner. The petitioner also asked for the custody of the child of the marriage.

M. L. Williams, for the petitioner: Where the question of imprisonment arises in connection with desertion, the cases can be divided into two groups: (i) where the petitioner relies on the imprisonment itself as constituting desertion, as in *Townsend v. Townsend* (1); (ii) where there is desertion followed by imprisonment. This constitutes desertion. The relevant factor is the manner of leaving. If the respondent has deserted the petitioner, the fact that he afterwards commits a criminal offence and is sentenced to imprisonment cannot affect the petitioner's rights. [Counsel referred to *Astrove v. Astrove* (2), *Drew v. Drew* (3), *Wynne v. Wynne* (4) and *Parker v. Parker* (5).] The present case is governed by *Drew v. Drew* (3), but that case goes further than the present case, because here the respondent did not return to the petitioner after his release.

CROOM-JOHNSON, J.: On the facts, I shall draw the inference that the husband had the intention of deserting his wife, because he remained away from her before he was imprisoned and did not go back to her after he was released.

Decree nisi with custody of the child of the marriage.

Solicitors: *Solly, Marshall & Co.* (for the petitioner).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

Re BRIGHTON (EVERTON PLACE AREA) HOUSING ORDER 1937, E. ROBINS & SON, LTD.'S, APPLICATION.

[COURT OF APPEAL (Slessor, MacKinnon and Finlay, L.JJ.), November 16, 17, 1938.]

Public Health—Clearance area—Compulsory purchase order—Whether local authority entitled to proceed by compulsory purchase rather than by demolition—Housing Act, 1936 (c. 51), ss. 25, 29 (1), Sched. I.

The applicants were the owners of a site which admittedly could properly be declared to be a clearance area. They had for some time been in communication with the local authority upon the question of the demolition of the property and the redevelopment of the site. The local authority without further notice to the applicants declared the area to be a clearance area, and on the same day made a compulsory purchase order in respect of the property, which order was confirmed by the Minister, after an inquiry had been held:—

HELD: (i) any injury to the applicants was caused solely by the act of compulsory purchase, and this was an act which the local authority were specifically authorised by the statute to perform.

(ii) when the Minister confirmed the order, there were no objections before him which could properly have been taken under the statute.

There was, therefore, no *lis* between the parties, and the Minister acted, and was entitled to act, ministerially, and not quasi-judicially.

(iii) it is a matter for the discretion of a local authority whether they choose to proceed by means of a clearance order or by means of a demolition order.

Decision of DU PARCQ, J. ([1938] 2 All E.R. 146) affirmed.

[EDITORIAL NOTE.] The contention in this case is that there is an exercise of judicial authority, and not of ministerial authority, and that, therefore, any discretion exercised either by the local authority or by the Minister has to be exercised upon judicial principles. It has been held, however, that the acts of the authorities in this case were purely ministerial, and not quasi-judicial, and that therefore the authorities had an absolute discretion in the matter. It was also pointed out that the only act of the local authority of which complaint could be made was the making of the compulsory purchase order, and this they were specifically authorised by statute to do.

AS TO COMPULSORY PURCHASE ORDERS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 540, 541, paras. 1144, 1145; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 502g-502v.]

Cases referred to:

- (1) *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., Ltd.*, [1927] A.C. 226; 38 Digest 28, 149; 96 L.J.P.C. 25; 136 L.T. 417.
- (2) *Errington v. Minister of Health*, [1935] 1 K.B. 249; Digest Supp.; 104 L.J.K.B. 49; 152 L.T. 154.
- (3) *Re Greenwich (Prince of Orange Lane) Housing Order, 1936, Willey's Application*, [1937] 3 All E.R. 305; Digest Supp.; 157 L.T. 67.
- (4) *R. v. Board of Education*, [1910] 2 K.B. 165; 42 Digest 614, 141; 79 L.J.K.B. 595; *sub nom. R. v. Board of Education, Ex p. Swansea, Oxford Street (Church of England) School Managers*, 102 L.T. 578; *affd. sub nom. Board of Education v. Rice*, [1911] A.C. 179.
- (5) *R. v. Local Government Board, Ex p. Arlidge*, [1914] 1 K.B. 160; 42 Digest 602, 15; 83 L.J.K.B. 86; 109 L.T. 651; *on appeal, sub nom. Local Government Board v. Arlidge*, [1915] A.C. 120.
- (6) *Roberts v. Charing Cross, Euston & Hampstead Ry. Co.* (1903), 87 L.T. 732; 42 Digest 723, 1423.
- (7) *Howard-Flanders v. Maldon Corpn.* (1926), 135 L.T. 6; Digest Supp.
- (8) *Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430; 38 Digest 25, 137.

APPEAL by the applicants from a decision of DU PARCQ, J., dated Mar. 9, 1938, and reported [1938] 2 All E.R. 146.

A. M. Trustram Eve, K.C., and *Geoffrey Lawrence* for the appellants, the applicants.

Valentine Holmes for the respondent, the Minister of Health.

Trustram Eve, K.C.: It is the duty of the local authority to consider the rights of the owners. If there are two methods of carrying out statutory duties, and one will cause damage to a third party whereas the other will not, the local authority are under a duty to use the latter method: *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., Ltd.* (1). They must use reasonable care to do no unreasonable damage to a third party: *Roberts v. Charing Cross, Euston & Hampstead Ry. Co.* (6), *Howard-Flanders v. Maldon Corpn.* (7) and *Geddis v. Bann Reservoir Proprietors* (8). In *Errington v. Minister of Health* (2), it was

held that the functions of the Minister were quasi-judicial. In the present case, the Minister never considered the rights of the applicants. The decision in *Re Greenwich (Prince of Orange Lane) Housing Order, 1936, Willey's Application* (3) was wrong. The judgment in that case was delivered on June 6, 1937, between the date of the inquiry and the Minister's decision in this case. The Minister was a party to that case, A and instructed counsel. The court must assume that the Minister acted on that judgment. In every case, the Minister ought to consider whether it is in the public interest that an order should be made, even in cases where there is no objector. If the Minister is sitting as a judge, it is surely not too much to ask him to act in such a way as not to do the B objectors needless harm.

Holmes : All the requirements of the Act were complied with. The Act applies only to houses that are unfit for human habitation. The action complained of here is the purchase, but that is the precise thing authorised by the Act. (He was stopped by the court.) C

Trustram Eve, K.C., in reply : The judge said that the Minister would start with the idea that the local authority was probably right. He ought to start with an open mind. This court should not sanction a construction of this Act that would allow a local authority always to purchase in these cases. The court should construe an Act so as to D prevent an obvious mischief.

SLESSER, L.J. : This is an appeal from a judgment of DU PARCQ, J., as he then was, exercising a jurisdiction under the Housing Act, 1936, Sched. II (2). It is there provided, dealing with an order such as we E have to consider, among other things, that :

If any person aggrieved by such an order as aforesaid, or by the Minister's approval of a re-development plan or of a new plan, desires to question the validity thereof on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within 6 weeks after the publication of the notice of confirmation of the order, or of the approval of the plan, make an application for the purpose to the High Court, and where any such application is duly made the court . . . (ii) if satisfied upon the hearing of the application that the order, or the approval of the plan, is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order, or the approval of the plan, either generally or in so far as it affects any property of the applicant. F G

This power is given substantially in substitution for the older method of procedure by prohibition or *certiorari*, and it is necessary that the appellants should bring themselves within the ambit of the provisions of that schedule. H

In this case, the Brighton Corporation decided to exercise certain powers under the Housing Act, 1936, s. 25. Those powers are given under certain conditions, and in the present case there is no question but that all those conditions were complied with. Therefore, it is not necessary to recite them in any detail. It is sufficient to say that, first of all, they

have to satisfy themselves generally under sect. 25 (1) (a) that, as regards a particular area, which is called a clearance area :

. . . the houses in that area are by reason of disrepair or sanitary defects unfit for human habitation. . . .

Then there follow certain other grounds. They have also to satisfy themselves :

(b) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area. . . .

Then the authority may cause the area :

. . . to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation [and declare] the area so defined to be a clearance area.

I omit words not here material. Then there is a proviso that they must satisfy themselves that there is suitable accommodation for persons of the working classes who may be displaced by the clearance of the area, and also that the resources of the authority are sufficient for the purposes of carrying the resolution into effect.

In accordance with these requirements, the local authority carried a resolution confirming the existence of those conditions. On that resolution being carried, it was decided to put into operation the powers which they possessed under sect. 25 (3), which says :

So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say, (a) by ordering the demolition of the buildings in the area ; or (b) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon.

They elected in this case to use the latter method, and decided to purchase the area, which was done. Thereupon objection was taken to the latter proceeding. It is provided, once they have decided so to purchase the area, by sect. 29 (1) of the same Act as follows :

Where a local authority have determined to purchase under this part of this Act land comprised in, or surrounded by or adjoining, a clearance area, they may purchase that land by agreement, or they may be authorised to purchase that land compulsorily by a compulsory purchase order made and submitted to the Minister and confirmed by him in accordance with the provisions of the first schedule to this Act.

There was here, as affecting this particular land, no agreement with the owners interested in the land, whose point of view I will mention in a few moments, and, therefore, the authority did seek a compulsory purchase order in accordance with the provisions of Sched. I. Under that schedule, it is provided with regard to orders made under sect. 29 that there must be an inquiry, and the inquiry was duly ordered to be held. The grounds of objection which were made at the inquiry are exhibited in an affidavit sworn in the present proceedings. Some of them are now no longer relied upon. It was complained that the buildings were not unfit for human habitation, and that some of them ought not to be included in the area. These objections have now been withdrawn.

I come, therefore, to the material objections which were urged by the owners before the inquiry. They are as follow :

(3) That in making the said compulsory purchase order the corporation were acting and acted *ultra vires*, and that the said order is *ultra vires* and ought not to be confirmed. (4) That before making the said compulsory purchase order the corporation well knew that the objectors were willing and able to comply with a clearance order made under the Housing Act, 1936, ss. 21, 25 (3) (a) : that if, which is not admitted, the buildings included in the said compulsory purchase order were properly to be dealt with by the corporation under the Housing Act, 1936, s. 25 (1), the purposes of the said Act could and should have been properly secured in the circumstances of this case by the making of such a clearance order : and that the making of the said compulsory purchase order was, in all the circumstances of this case, unnecessary, unjustifiable and inequitable, and will cause unnecessary and unjustifiable hardship to the objectors.

That is dated Mar. 22, 1937. Those objections were urged before the gentleman appointed by the minister to hold the inquiry. Evidence was adduced on each side. As I read the evidence it was conceded by the witnesses called on behalf of the corporation that, generally speaking, it was the policy of the corporation to exercise their powers under the Housing Act, 1936, s. 25 (3) (b). I do not think that very much can be made of that matter either way, because, of course, no officer can bind the corporation as to how they will exercise their powers. For what it is worth, however, Mr. Baxter, the assistant borough engineer of Brighton, did say that it was the corporation's policy to make compulsory purchase orders.

On Feb. 25, 1937, the corporation having made the order for the compulsory acquisition of the land, objection having been taken, and the inquiry having been held, the matter was then referred to the Minister. On July 22, 1937, the Minister confirmed the order for the compulsory purchase of land in and adjoining the area the subject-matter of the resolution and of the inquiry. I may say that those lands not only included the original clearance area, but also contained additional lands which, under the statute, if an order be made, may be added to the original land, called the land marked grey, in contradistinction to the land covering the original area, marked pink. However, no case is made here that, if there were power to purchase the land marked pink, the powers under the statute might not properly extend to cover the land marked grey.

I desire, in this somewhat complicated case, to exclude from my consideration any matters which are not really in issue before the court. On that, the objection was taken before DU PARCQ, J., that was taken before this court in impeachment of the original order made by the corporation and the confirmation made by the Minister—namely, that the order of confirmation was bad primarily for this reason.

It is pointed out by Mr. Eve, and really I do not think that the matter is one which can possibly be questioned, that, to quote LORD ATKINSON in *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., Ltd.* (1), at p. 243, where

... a man or a public body have statutory powers which he or they may at will exercise in a manner hurtful to third parties, or in a manner innocuous to third

parties, that man or body will be held to be guilty of negligence if he chooses or they choose the former mode of exercising his or their powers and not the latter...

I think that Mr. Eve is entitled to say that they are guilty, not only of negligence, but also of acting beyond their powers, if they act negligently or unreasonably.

A I do not propose to review the several cases which established this proposition beyond question, because in my view they have no application to the present case, and for this reason. The complaint which is made that injury will be caused to the third party arises from the very purchase of this land.

B It is necessary now to explain summarily what that complaint is. The owners of the land are brewers. They have a large business, and the facilities for dealing with their traffic are very restricted. In order, therefore, to enlarge the area for, and method of, dealing with their traffic engaged in taking away and transporting their commodity, they have purchased a number of houses situated upon this clearance area which the local authority have decided to be unfit for human habitation. It is said that it was their intention to destroy those houses themselves, and that they would already have done so but for the operation of the Rent Restriction Acts. It is further said that it was their intention, both as to the land marked pink and as to the further land marked grey, which is also part of their land, to build upon it roads and a kind of dock and to open warehouses on it—the plan has been exhibited—where they could place their casks and other commodities upon trucks or upon wagons. It is said that they intended to do that, but that they were prevented from doing it only by the operation of the Rent Restriction Acts, and that they could now proceed to do it if only the local authority would order demolition of the buildings in the area—that is to say, if they would carry out their powers under sect. 25 (3) (a)—which would leave the land in the possession of the owners, when they could deal with it according to their desire. The applicants say that, if the local authority exercise their powers under sect. 25 (3) (b) by purchasing the land, then the result will be that, when they have purchased the land, one of two things must happen: either under the statute the corporation must demolish the property and then sell, or they must let it again to some other person, unless they get express authority from the Minister to keep the land themselves. That is in accordance with sect. 30 of the Act, which deals with the treatment of a clearance area.

G The suggestion has been fairly broadly made that what will happen in this case is that the authority, being so possessed of the land, will attempt to sell it back to the persons from whom they have taken it, and at an enhanced price. I say nothing about that, beyond remarking first that that is a matter of speculation in the future, and I do not think that there is any evidence on which one is entitled at this stage to come to the opinion that they will do that. If that had been shown to the satisfaction of the person who held the inquiry to be their apparent intention,

it might well have been the case—I will not put it higher than that—that the Minister might have hesitated to confirm the order. However, all that seems to me irrelevant to anything we have here to consider.

The fatal objection to invoking the principle that the authority have to act reasonably, so as not to injure the interests of third parties, as applied to this case is provided by sect. 25 (3), where there is express power given in unambiguous language to the local authority to

... proceed to secure the clearance of the area in one or other of the following ways. . . .

The second one, (b), is by purchase. The very complaint which is made of injury to the third party arises only through the act of purchasing, which is the very act which they are expressly authorised to do. Therefore, I think that this case comes within that class of case which has been mentioned in some of the earlier authorities—namely, that, though a person must act reasonably, if he is authorised to do a specific act under an Act of Parliament, he can do that specific act notwithstanding that it may do injury to another. Here the corporation are expressly authorised to purchase. The mere fact that their purchase may or may not cause injury to another does not seem to me to interfere with the discretion which they have as to which order they will make, always subject, of course, to confirmation by the Minister.

I now come to the second question in the case, which arises with reference to the proceedings at the inquiry and the decision of the Minister himself. It has been pointed out very clearly in a case cited to us by Mr. Eve, *Errington v. Minister of Health* (2), that under this Act the Minister, in considering any issue between the parties, acts quasi-judicially. It is thus stated by GREER, L.J., at p. 259 :

... the position ... is different where objections are taken by those interested in the properties which will be affected by the order if confirmed and carried out. It seems to me that in deciding whether a closing order should be made in spite of the objections which have been raised by the owners the Minister should be regarded as exercising quasi-judicial functions. The effect of the closing order if confirmed would be to diminish greatly the value of the property owned by the objecting parties, and the decision of the Minister is a decision relating to the rights of the objecting parties and, in my view, it is a decision in respect of which he is exercising quasi-judicial functions.

However, GREER, L.J., is equally careful to point out that, where there is no objection before the Minister—that is to say, no objection which is an arguable objection, and produces a *lis* as between the parties—the position is, to quote the Lord Justice at p. 259 :

... in so far as the Minister deals with the matter of the confirmation of a closing order in the absence of objection by the owners it is clear to me, and I think to my brethren, that he would be acting in a ministerial or administrative capacity, and would be entitled to make such inquiries as he thought necessary to enable him to make up his mind whether it was in the public interest that the order should be made.

In my view (and in this it may be that I am not entirely in accord with the judge who tried the case below) this was a case where the Minister was entitled, on the facts of this case, to act ministerially. I do not think,

A having regard to the objections which had been made, which seemed to me objections which could not properly be taken under the statute, that there was any *lis* before the Minister at all. The point—and, as I see it, the only point—which had been taken at the inquiry was, to quote the actual language of the objection, that it was unnecessary, unjustifiable and inequitable to make this order under (b). That was the ground of the objection. The only other matter is the reasons. If my view be right—

B namely, that this was entirely a matter for the discretion of the local authority as to which way they would proceed to clear the area—that objection was an invalid objection in itself. It might have been a valid objection if it had been based solely on a consideration of (b), but, as I read it, it is an objection, as it is framed, to the use of (b) rather than to the use of (a)—that is to say, that the purchase was “unnecessary, unjustifiable and inequitable,” and that the buildings ought to have been ordered to be demolished. I do not think that that was a matter for

C the Minister. I think that the Minister might properly consider, the local authority having the choice whether they would proceed by (a) or (b), whether he would in the public interest confirm (b). One of the grounds on which he might refuse to confirm (b) would be, for example, that it was being used *mala fide* to extort money out of the company. I

D agree respectfully with the judgment of SWIFT, J., in *Re Greenwich (Prince of Orange Lane) Housing Order, 1936, Willey's Application* (3), where he says, at p. 308 :

E It is not for the local authority, in my view, to call evidence to show why it thinks it is better that the land should be bought by it than that it should make a clearance order, or why it should make a clearance order rather than that it should purchase the land, nor is it for the owner. . . .

As I read his judgment, he takes a view which impresses me as the right view—namely, that that matter is entirely within their discretion. Therefore, if the only question for consideration before the Minister in this case, there being no objection taken on the ground that the conditions of sect. 25 were not being fulfilled, was whether or not it was

F expedient in the public interest that the order should be confirmed for purchasing the land (the other objection which was sought to be taken—namely, that the local authority ought to have proceeded under another power—being a bad objection which really does not arise on the con-

G firmation as such), it seems to me that he was acting in a ministerial capacity. However, whether he was acting in a ministerial capacity or whether he was acting in a judicial capacity does not really affect the result in this case. This is not a case like *Errington* (2), where he heard *ex parte* statements on one side. We are told in the affidavit which is

H sworn on behalf of the Minister by Mr. Wrigley :

Before a decision was arrived at to confirm the order, the report of Mr. E. Hall, as to the evidence given at the inquiry [Mr. Hall was holding the inquiry] and as to his personal inspection of the properties included in the order, together with the representations made by the applicants, were duly considered.

It is not suggested that any other evidence was improperly placed before the Minister, nothing which could conceivably found any of the require-

ments laid down in *R. v. Board of Education* (4) or in *R. v. Local Government Board, Ex p. Arlidge* (5).

It is true that, the Minister having come to the conclusion, as a result of such consideration, that he considered the properties were unfit for human habitation (and that was not in issue), and that the land coloured grey was reasonably necessary for the satisfactory development of the cleared area (I do not think that that was in issue), he did add :

... that the proposed development scheme put in by the applicants at the inquiry was unsuitable.

In my view, having regard to the fact that the whole matter before him was solely the question of confirming the power to purchase, I think that that consideration, though really immaterial to the matters which he had to confirm, was not a consideration of such a nature that it can be said he took into account something which would invalidate his general powers. It was clearly not such a consideration as would invalidate his decision, if he were acting ministerially. I do not think that, even if he were acting quasi-judicially—and I have given reasons for supposing that that is not the true view of his function in this particular case—it can possibly be said to invalidate his confirmation of the order.

The owners had argued, in view of the injustice with which they were being treated : “ If you will only go under (a), we will ourselves erect this dock for the convenience of our property.” On that, Mr. Wrigley did think that, if that were to be done, it would in some way offend against the amenities of the district. I think that it was an irrelevant consideration, but I do not think that it was one of any substance. I certainly do not think that that in any way justifies the appellants coming here and asking us to say, within the language of Sched. II of the Act, that what was done was not within the powers of the Act ; nor do I think that the interests of the appellants have been substantially prejudiced by any of the requirements of the Act not having been complied with. In my opinion, both what the local authority and what the Minister did were within the powers of this Act, and I do not think that any requirement of this Act has not been complied with. I think that the judge was right in refusing to quash the order, and that this appeal fails.

MACKINNON, L.J. : I agree. On the facts of this case, one possible result of this Act is very remarkable. The appellants some years ago bought this property with the sole object of obtaining a vacant site for buildings they wished to erect in the course of development of their existing premises. For some years they have been prevented from carrying out that desire by reason of the operation of the Rent Restriction Acts. The corporation, having power to acquire the site unhampered by those Acts, could and did declare it a clearance area under sect. 25. The corporation could then under sect. 25 (3) secure the demolition of the buildings either (a) by an order for the demolition of the buildings or

(b) by an order for compulsory purchase. Considering that the order for demolition would be welcomed with alacrity by the appellants, as to whose power to comply with it there can be no doubt—I say with alacrity because it would be carrying out what they have been long desiring—one might have expected that an order under (a) for demolition would have been made. The corporation, however, preferred to make an order under (b) for compulsory purchase. Thus they can pull down the buildings themselves, although, as I have said, there is no suggestion that the appellants could not pull down the buildings themselves with equal diligence. The corporation, if they pull them down and acquire the land, can sell it under sect. 30 (1) (a), or, without pulling down the buildings, having purchased them, they can sell the site under sect. 30 (1) (b), subject to a condition that the purchasers shall pull them down. Obviously, in either case, the appellants here, who want to extend their existing premises, must be the most eager purchasers. In such circumstances, the possibility of using the provisions of the Act for the indirect purpose of making money out of the appellants is obvious. I do not for one moment assume that any such purpose is contemplated. I only say that it is a possible result under the provisions of this Act, and one which I have to characterise as remarkable. Such a result would, of course, be avoided if an order for demolition under sect. 25 (3) in place of an order for purchase were made.

Is there anything within our powers under this Act, however, which enables us to quash the order of the Minister confirming the order for compulsory purchase on the ground that the proper order to be made was a demolition order, and therefore the purchase order was wrongly made? I think that there is not, for the reasons stated by SLESSER, L.J., which I do not think that I need repeat. In the result, I agree that this appeal fails.

FINLAY, L.J.: This matter, which is one of great importance, has been so fully examined by SLESSER, L.J., that I need add only a very few sentences. The case is undoubtedly an important one, and it has been very elaborately and very carefully argued. For myself, however, I think—and in this I follow SLESSER, L.J.—that it can be decided upon a very simple ground indeed.

We have power to interfere, as DU PARCQ, J., had power to interfere, only if we are satisfied that the order is not within the powers of this Act, or that the interests of the applicants have been substantially prejudiced—it does not say substantially prejudiced generally, but substantially prejudiced—by any requirement of this Act not having been complied with. For myself, I have not been able, from an early stage of the argument, to see how it can possibly be said that this is not within the powers of the Act, or that, by reason of some requirements of the Act not having been complied with, the interests of the applicants have been substantially prejudiced.

Out of respect to the argument to which we have listened, I will add this on the construction of sect. 25. It seems to me to be plain that the true construction of sect. 25 (3) is this. It is left to the local authority to proceed in one of two ways—either by ordering demolition or by purchasing. For myself, I agree with the way in which this matter was put by SWIFT, J., in the case which has been referred to, *Re Greenwich (Prince of Orange Lane) Housing Order, 1936, Willey's Application* (3), where he says, at p. 307 :

It seems to me that sect. 1 (3) gives the local authority an absolute right to secure the clearance of the area in either of the two ways as it likes, or partly in one and partly in the other. It is for it to decide it.

That seems to me to be correct. I think that that shows why—and here again I follow SLESSER, L.J.—none of the series of cases, some of which were referred to before us, about powers of local authorities has any application. There has been a long line of cases which say that, where powers are given to a local authority and there are various ways in which those powers may be exercised, the local authority must act reasonably. If, having several courses open to them, they adopt a course which would do injury to private individuals when they need not do that injury, then their act will be considered to be illegal.

The principle is clearly stated in a passage which SLESSER, L.J., read just now from the opinion of LORD ATKINSON in *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., Ltd.* (1), at p. 243. It is sometimes rather difficult to reconcile these cases, but I think that it is here quite unnecessary for us to consider them, for the simple reason that here the local authority are expressly given authority to do one of two things, whichever they like. They may either demolish or purchase. The alleged injury of which complaint is here made arises, not from their carrying out the powers given to them in some particular way, but, in my opinion, simply from their exercising a power which is specifically given to them by their purchasing this property. It seems to me that in this case it is impossible for us to say that there is any ground upon which this court or DU PARCQ, J., sitting as a court of first instance, can interfere. I have added these few remarks because the matter is undoubtedly an important one, but I respectfully agree entirely with the way in which the matter was put by SLESSER, L.J.

Appeal dismissed with costs.

Solicitors : *R. C. Bartlett & Co.*, agents for *F. W. A. Cushman & Son*, Brighton (for the appellants) ; *The Solicitor, Ministry of Health* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

BAXTER v. F. W. GAPP & CO., LTD.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
November 9, 10, 11, 14, 16, 1938.]

Agency—Professional agent—Duty to use care and skill—Valuation of property—Advance by way of mortgage on footing of valuation—Negligence—Knowledge of locality—Reliance upon valuation—Measure of damages.

The defendant, an estate agent, was sued for negligence in making a valuation of property for the purpose of an advance by way of mortgage. It appeared that the defendant inspected the property but failed to make any local inquiries as to the value of that or similar properties in that locality. The defendant had not practised in the locality. The defendant also failed to inquire the price the property had realised upon recent dealings. The valuation was £1,800. The property had been purchased by the mortgagor for £600, and the highest price at which it had changed hands in recent times was £850. Certain additions and alterations to the property were, at the time of the valuation, being made, and the defendant advised an advance of £1,200 upon first mortgage, subject to £200 being retained pending the completion of the additions. The defendant subsequently advised an advance of £150 on second mortgage. This valuation was given to the plaintiff's solicitors, who subsequently discovered the price the property had realised in recent transactions, and also received a suggestion that the value was too high, from a local agent:—

HELD: (i) the defendant must be taken to have held himself out as possessing the necessary experience and skill to value this particular property. His knowledge of property in the locality was insufficient, and he ought to have taken steps to inform himself of the value of similar properties there, which he had failed to do.

(ii) the facts did not support a contention that the plaintiff had not relied upon the defendant's valuation.

(iii) the measure of damages was the whole loss sustained by the plaintiff, and included the expenses of the abortive sales, insurance premiums, builder's account for upkeep of the property, mortgagee's expenses and disbursements and the agent's commission upon the ultimate sale of the property, in addition to the principal advanced and the interest unpaid.

[EDITORIAL NOTE.] The judgment herein discusses at length the duty of a professional man called upon to give professional advice. The particular profession in this case is that of estate agency, but in a general way the same principles apply to other professions. The facts of the case entail a consideration of the duties of an estate agent when called upon to value a property outside his own area and in a district in which he has had no previous experience of the valuation of properties. The judgment concludes with an examination of the measure of damages in such a case, and in general decides that all the expense and loss to which the mortgagee has been put or which he has suffered are to be included in the assessment.

AS TO AGENT'S DUTY TO USE CARE AND SKILL, see HALSBURY, Hailsham Edn., Vol. 1, pp. 244-246, paras. 416, 417; and FOR CASES, see DIGEST, Vol. 1, pp. 433-435, Nos. 1239-1266.]

Case referred to:

(1) *Kennedy v. De Trafford*, [1897] A.C. 180; 35 Digest 504, 2356; 66 L.J.Ch. 413; 76 L.T. 427.

ACTION for damages for breach of contract by a mortgagee against a firm of surveyors, and the partner who made the survey, alleging negli-

gence, and want of skill and care in advising the plaintiff that the property was a good security for an advance under the Trustee Act, 1925, of £1,200 on first mortgage and £150 on second mortgage. The defendants' report was as follows :

We have carefully considered the market value of this property, and having taken all matters into consideration, we value this freehold property known as Garden Lodge, Derek Road, Maidenhead, Berks, when the alterations have been completed, in the sum of £1,800, assuming, of course, the property is free from land tax and tithe, and we are therefore prepared to advise, having regard to the Trustee Act, 1925, that the sum of £1,200 be advanced on first mortgage, subject to the amount of £200 being retained until the alterations and additions as above mentioned are completed and passed by us, and we consider this property a reliable trustee security for an advance of this figure.

Recommendation.—We advise a re-valuation in, say, five years from this date, in case there should be fluctuations in value due to circumstances we cannot at present foresee.

The plaintiff claimed the amount of all the principal advanced, the solicitor's costs incurred, the interest accruing due from Feb. 28, 1936, the expenses of the abortive auction sales, premiums paid on Feb. 8, 1937, and Jan. 6, 1938, upon a comprehensive insurance of the property, a builder's account for work done to the property, mortgagee's expenses and disbursements, and the agent's commission upon the ultimate sale of the property.

J. P. Eddy, K.C., and *Harold Willis* for the plaintiff.

G. Russell Vick, K.C., and *E. Ryder Richardson*, for the defendants.

GODDARD, L.J. : In this action the plaintiff sues a company and its managing director, Mr. Gapp, for negligence in making a valuation of a freehold property consisting of a bungalow and gardens at Maidenhead, upon which the plaintiff was desirous of lending money by way of mortgage. The defendant valued the house at £1,800. When the mortgagor made default, and the property was sold, it realised the sum of £850, which, with loss of interest and so forth, constituted a serious loss to the plaintiff. He brought this action against the defendants, alleging that the valuation of £1,800 was not a justifiable valuation, and that it was made negligently.

The case is one of some difficulty, and has caused me some anxiety, especially as it is an action against a professional man, for one is always reluctant to find that a professional man, who is acting in good faith—there can be no suggestion here that Mr. Gapp was acting otherwise than in good faith—has been guilty of negligence. It is therefore necessary to examine the facts with some care. In 1935, Mr. Gapp was approached by a firm of mortgage brokers who were desirous of obtaining an advance on the security of this house for the then occupier and owner, a Miss Holley. Mr. Gapp was well known to the solicitors for the plaintiff, with whom he had had business on previous occasions, and he laid the proposition before them. They had a client, a Mr. Baxter, who was looking for a mortgage, and they were willing to entertain the business. As is customary in these matters, they employed the estate agents who

A introduced the matter to them to value the property. It is not very
clear what Mr. Gapp's knowledge of Maidenhead properties was. I do
not think that he had very much knowledge of Maidenhead property
as such, but he undertook the valuation, and, therefore, of course, in
undertaking it he undertook it subject to all the liabilities to which that
employment subjected him. I think one may state quite simply the duty
which he owed. His duty was, first of all, to use reasonable care in coming
to the valuation which he was employed to make and he must be taken
to have held himself out as possessing the experience and skill required
to value the particular property. If he did not know enough about the
property market, or the value of the property at the place where the
property was situate, he ought to have taken steps to inform himself of
the values of properties there, or of any circumstances which might affect
the property. It would be no defence, for instance, to say: "I made
this valuation, but the reason why my valuation has proved incorrect, if
it has proved incorrect, is that I was not a person, as you knew, who
practised in that locality." It may have been that it would have been
wiser to employ a person practising in the locality, but, if a man under-
takes the work, of course, he cannot be heard to say, if his valuation turns
out wrong, and to be such as cannot possibly be supported: "The
reason for that was that I did not know enough about property in that
neighbourhood." On the other hand, one also has to bear in mind very
carefully the fact that valuation is very much a matter of opinion. We
are all liable to make mistakes, and a valuer is certainly not to be found
guilty of negligence merely because his valuation turns out to be wrong.
He may have taken too optimistic or too pessimistic a view of a par-
ticular property. One has to bear in mind that, in matters of valuation,
matters of opinion must come very largely into account.

Mr. Gapp went down to see the property on a Sunday—not, perhaps,
the day when we expect a professional man to be making a valuation.
I am not saying that from any Sabbatarian point of view, or prejudice,
but, as a rule, one would not suppose that a valuer would make his in-
spection on Sunday, especially if it was necessary, or he thought it was
necessary, to make any inquiries in the place before coming to an opinion.
He had tea with the people in the house, Miss Holley and a gentleman
who was described as Miss Holley's man of business, and no doubt the
property was painted in very glowing colours by those people, who were
naturally anxious to get as much money as they could on the property.
It was then a comparatively small bungalow. It lay in a private road
just off Ray Mead Road, which runs along the bank of the Thames at
Maidenhead from the Maidenhead Bridge towards Cookham, and is on
the level of the banks of the river, just by Boulter's Lock, as was dis-
closed in Mr. Gapp's report. Anybody reading Mr. Gapp's report, I
think, would realise, as indeed the plaintiff's solicitors did realise, that it
was so near to the river that it must be regarded as being practically
on the level of the river banks. It is not a property, I should say at once,

of the type with which one is very familiar on the Thames, especially in the neighbourhood of Cookham and Marlow and Maidenhead, a riverside property with the gardens running down to the river. It lies a few hundred yards from the river, and is in a road where there are other properties of a somewhat similar nature. Undoubtedly, since she had bought the house the mortgagor had spent a considerable sum of money on improvements. Central heating had been installed, running water had been put into the bedrooms, and a new wing was in course of erection. I should think that it was for the purpose of paying for this new wing that the mortgage was required. Mr. Gapp no doubt had to visualise what the property would be like when it was finished. I do not gather that there was very much difficulty in doing that. Not only did Mr. Gapp have the plan, but also the work was far enough advanced for him to get a fair idea of what the property would be like. A day or two after his visit, he wrote his report, in which he advised that the value of the house was £1,800, and that he would advise the full amount of two-thirds being advanced on the property, which apparently he regarded as a trustee investment. When the solicitors saw this, they put it before their client, who was ready to entertain the proposition. Then there came the delivery of the abstract of title to the solicitors, and the first thing they noticed was that the intended mortgagor had paid only £600 for this property. It had changed hands three times in recent years. I think that the most for which it had ever changed hands was £800 or £850. The sums it had changed hands for were a great deal less than the sum at which Mr. Gapp was valuing it, although he was valuing the property as it would be when finished, with the new wing added, and although he had also to take into account the improvements which had been effected. The solicitors called Mr. Gapp's attention to this fact, and, as Mr. Gapp said, that made him think. Either because it made him think or because it was suggested by the solicitors, or for both reasons, he resolved to consult a friend of his in the same profession, a Mr. Humfrey at Maidenhead, as to the figure which he put upon this house.

The solicitors had also raised the question whether or not he had considered whether the property was liable to floods. Mr. Gapp's answer to that in the letter he first wrote was that, in his opinion, there was absolutely no danger of flooding. He consulted Mr. Humfrey, who, according to Mr. Gapp's evidence, told him that in his view £1,800 at any rate was a full price. I think that it was put either full, or very full, price: it matters not which. Mr. Humfrey had not then seen the property, and he said that he would go and have a look at it. After having looked at the property from the outside, but not from the inside, Mr. Humfrey returned and gave Mr. Gapp the somewhat vague advice that the property was worth from £1,200 to £1,600. Mr. Gapp, however, passed that information on to the solicitors, but stuck to his own valuation, and said that he was still of opinion that £1,800 was the proper price. Mr.

Humfrey also told him there was slight risk of flooding, and Mr. Gapp passed that on to the solicitors also, who in due course passed it on to their client. Thereupon, the client seems to have been satisfied that he could accept Mr. Gapp's valuation and advance up to two-thirds—namely, £1,200. I think that the client was taking some risk. Mr. Gapp suggested that £200 of that money should be retained until the alterations, or rather the additions, were completed. The client in fact retained only £100, but no one suggests here that the value of the house was in any way impaired by the alterations which had not been completed. They were substantially completed. At a later stage in the case, he was asked whether he could advise a further £250 being advanced on second mortgage, and he said that he thought not, but that he would advise £150. A further £150 was advanced at a much higher rate of interest—9 per cent., reducible to 8 per cent. if punctually paid. I ought to have said, perhaps, that the client had interest, not at $4\frac{1}{2}$ per cent., the amount of interest contemplated on the first mortgage, but at 5 per cent. I dare say that he did that because he thought, after hearing what Mr. Humfrey had said, that there was some risk in the matter. So far as the second mortgage is concerned, again I do not think that that really advances the case either from the point of view of the plaintiff or from that of the defendants, because, if Mr. Gapp's valuation was justifiable—I do not mean necessarily to £50, or even perhaps to £100, but if the house had a value of approximately £1,800, or anything near that figure—there was obviously room for a second mortgage of £150 to be taken on it, if the client was prepared to embark on that form of security, which, of course, is far more speculative than a first mortgage.

The rest of the case discloses a state of affairs unfortunate for both parties in this action. The mortgagor turned out to be an unsatisfactory sort of person. She did not pay her interest. She made default from the first. After she left in the autumn of 1935, the mortgagee, the plaintiff, entered into possession, and steps were taken to realise the security. It was put into the hands of Mr. Humfrey, who offered it by auction. A good deal has been said about the lack of advertisement and lack of preparation of the auction, but I think that one has to bear in mind that this was not property which would stand a lot of advertisement. In fact, a sum of £15 15s. was expended in advertising, but at any rate, whether or not it was advertised extensively (and I will assume that it was not), the result of the auction was that there was not a single bid, and the property remained on hand until 1938, when a Mrs. Riposo came along and saw the property and offered £800. A sale went through at £850. It is to recover the loss which the plaintiff has made on this property that this action is brought. In his pleadings, he has set out several matters upon which he relies as showing that Mr. Gapp was guilty of negligence. As a pure point of pleading, it is, of course, right that, if a plaintiff is relying upon specific matters in the way of negligence, or, rather, asserting matters as establishing negligence,

those should be pleaded as particulars of the statement of claim. On the other hand, I do not think that, in a case of this description, a plaintiff ought to be held entirely to the particulars, for this reason. The plaintiff's case is : " You advised £1,800 as the value of this house. That is the sum which you put upon it, and that was your valuation. I say that that was a negligent valuation because the house was never worth £1,800, A and was not worth anything like £1,800. You could not have exercised due care and skill in coming to that conclusion." From the point of view of pleading, I think that I should be inclined to hold that that was enough, and, unless some specific matter was going to be relied on, some specific omission or some specific act which was said to amount to negligence, it would be enough for the plaintiff to take up that line and to say : " I am going to show, by the evidence of experts and others, B that at no time could any reasonably careful valuer have said that £1,800 was the value of the house." I think that to a great extent that is what this case comes down to. I think that no one can say C that Mr. Gapp was negligent in saying that, in his opinion, there was no risk of flooding, and by that was meant the flooding of the house.

I do not want to say anything more about that, but that is not, to my mind, the difficulty in the way of Mr. Gapp in this case. The question of valuation must to a great extent be a matter of opinion, and must depend upon a valuer's experience, but it is difficult to believe that a careful valuer in making a valuation does not endeavour to get some data on which to work. It is not very helpful, especially if a valuation is afterwards challenged to say : " The only thing that I did was to go and look at the place." There are questions which can be asked, none of which Mr. Gapp did ask—for instance, what the person has paid for the property. True, he got to know of it afterwards, and, as he said, it made him think. In spite of what I heard in the somewhat conflicting accounts from the witnesses in the case as to the assessment being any guide, it seems to me impossible to say that the assessment can be no guide at all. D It is no accurate guide, I quite agree, but, if a house is rated at something like £30 gross, or even at £45 gross, it is obvious that that house has a value very different from that of a house which is rated, even in an area where assessments are low, at £70 to £80. That is obviously a different E proposition. This house was rated exceedingly low. I think that it is only fair to say that I do not at all accept the very condemnatory opinion that has been passed on this house by the plaintiff's witnesses. I was asked to go and see it, and, as it so happened that I was in the neighbourhood last Saturday, I went to see the house. I must assure the parties F that I do not attempt to set up as an expert in values. It is no part of a judge's education to be skilled in valuing, and I do not in any shape or form wish to substitute what I saw for the evidence which I have heard. G The advantage of going to see a property—and I may say that I have never yet tried a case relating to land or houses where I have not found H

a view to be of the greatest assistance—is that it enables one to appreciate the better the evidence which is given by the experts, who, as is usual, and as one would expect, differ very considerably on most material points. I am bound to say that the house is exceedingly attractive. As a bungalow, for those people who care to live in a bungalow, I should think that it is as attractive as any bungalow can be. It is expensively fitted, one may say almost extravagantly fitted, for the type of property that it is. I am not speaking as perhaps an eminent architect or a Royal Academician would speak, and I am not passing any judgment upon its architectural value, but it is idle to say that, being the sort of property that it is, and being in the neighbourhood in which it is, it has not got an attractive appearance. It has a very attractive appearance. Inside, the bungalow is, I think one may say, quite exceptional. There are two very good sitting-rooms, bright, large for the class of property, and well-fitted, and two bathrooms, fitted, I should think, at very considerable expense. The bedrooms are a good size, with good basins in them. The kitchen is a model of what a kitchen in a small property of this sort ought to be. Altogether, I am surprised at some of the evidence which has been given about this bungalow, because no one could see it without realising that, to a person who is willing to live in that sort of property, it must appear a very attractive place. I think that Mrs. Riposo, in getting that property for £850, got an undoubted bargain, and she thinks so herself. Of course, Mrs. Riposo having been here and given her evidence, I naturally did not discuss the matter with her when I was at the house. I think that perhaps I ought to say that one thing she did say—I could not stop her and I had no desire to stop her—was that, as she has redecorated the property, if she has to sell, she is not going to take less than £1,500 for the property. I only hope that she can get it.

Taking all these things into account, however, I still find it exceedingly difficult to understand how a valuation of £1,800 ever came to be put upon this property. I have to act upon the evidence which has been given in the case. Mr. Arnold, a person of considerable experience—he is vice-chairman of the local building society—inspected the place with a view to a mortgage, and put the value at between £800 and £900, and that figure was supported by Mr. Giddy. I say at once that I think that, giving due weight to the evidence I have heard, those figures are too low. I should be prepared to find, if I had to put a value on the property (and I do not have to do so), that the value was more than that. Mr. Hunt, who gave his evidence with some care, put it as high as £1,150. That was the highwater-mark, from Mr. Gapp's point of view, of the evidence called by the plaintiff. One cannot help noticing the very remarkable fact that Mr. Gapp has not been able to call into the box a single surveyor or valuer to support his figure of £1,800. Mr. Milne, who went nearer than anyone else—and he was not enthusiastic by any means—thought that somewhere about £1,600 might be put forward. The

inference I drew, after having heard Mr. Milne's evidence, was that Mr. Milne would not have advised that figure to a client if he had been valuing. At any rate, that was the highest he could go, and he had not, I think, made an inspection of the property. One difficulty in the way of Mr. Gapp is that, when his valuation is attacked, as it has been attacked, and when it is said, and said with a great deal of force, that the facts show that this valuation was wholly excessive, the only thing that he can point to as having been done by him to check or support his opinion that £1,800 was the proper valuation of this house was that he cubed it, and, having found the number of cubic feet, took the figure of 1s. 6d. However, that does not help at all, because the proper figure per cubic foot to take is again a matter merely of opinion, and, of course, you can support any valuation if, having got the number of cubic feet, you take the appropriate price per cubic foot. That does not help in the smallest degree, and, reluctant as I am to find that any professional man has not exercised due care in making a valuation, I am forced to the conclusion in this case that £1,800 was an entirely unwarranted sum to put upon this house, and I think that it is so unwarranted that it shows one of two things. I think that the more probable explanation in this case is that Mr. Gapp was not well enough acquainted with valuations at Maidenhead. Maidenhead was described as one of the dormitory areas. Whether or not that is a proper description of Maidenhead, I think that probably the mistake in this case has arisen from the facts that Mr. Gapp was not well enough acquainted with values at Maidenhead and that he did not pay sufficient attention to information which he got from Mr. Humfrey, the very vagueness of which, I think, ought to have put Mr. Gapp on much more inquiry than it did. In fact, what it did was to make him repeat with emphasis that £1,800 was the proper figure, and not only that it was the proper figure, but that, notwithstanding that this class of property—bungalow property—must be subject to severe fluctuations, and of a somewhat speculative character, the full amount of two-thirds could be advanced on this property, and that it could be looked upon as a trustee investment.

Having heard the evidence in this case, and having seen the property, I can only say that I do not think that that was a justifiable sum. I must therefore hold that the plaintiff has made out a case, and that he is entitled to recover. Mr. Vick argued, and put forward with considerable vigour, the proposition that I ought to find here that Mr. Baxter did not rely upon Mr. Gapp's valuation. Where a plaintiff has employed and paid a person to value property for him, and has then advanced the amount of money which the valuer has advised, it requires a good deal to induce a court to say that the client did not rely upon the valuer's valuation. It does not lie in his mouth to say that unless he has very good ground for it. The only ground on which Mr. Vick could found his suggestion was that the solicitors passed on to their client the information that Mr. Humfrey had said that he thought the value was between £1,200 and

£1,600 and that the property was subject to slight flooding. The fact that Mr. Gapp then said: "Notwithstanding that, I stick to my valuation," was also known to the solicitors, and the fact that the client, who has sworn he did rely on it, decided that he would advance the money which Mr. Gapp advised seems to me to make it almost conclusive that he did rely on Mr. Gapp. He may have thought that he was taking some risk, but that is not enough. I think that he did advance this money on the faith of Mr. Gapp's valuation, and that is the only conclusion to which I can come on the evidence on that point.

I now turn to the question of what damages the plaintiff is entitled to recover. The plaintiff says: "My measure of damage is this: if you had given me careful information, made a careful valuation, this property would have been valued at a considerably lower sum. I should never have entered into this transaction at all." That is to say (I ignore the £150 for this purpose): "I should never have entered into that first mortgage transaction under which I advanced £1,200. Whether I should have entered into another transaction advancing £1,000, or whether I should have advanced £800, I do not know, but I should never have advanced this £1,200. I therefore entered into a transaction into which, but for your advice, I should never have entered. Therefore, if I show that I have a cause of action, my damage is the damage I have sustained through entering into this transaction." That seems to be right, unless, of course, some different measure has to be applied in ascertaining the actual damage he has sustained through the negligent valuation. Therefore, I think that one has to examine rather carefully the facts and the law with regard to this, because this matter is a question of law, and, if I am wrong on this question of law, I can be put right in another court. The facts relating to this I have already briefly indicated. It is said that in 1936 he re-took possession. The auction was in June, 1937. The property then had been vacant a long time, and no one had come forward. It is said: "You did not advertise the property satisfactorily. You did not put an illustrated advertisement on the back page of *The Times*." That may be agreed. I dare say that it helps sales to do it. Certainly, if one may speak from one's own experience, the appearance of a property as one sees it in a photograph on the back page of a newspaper, when it is taken in the most favourable circumstances and at the most favourable angle, and the appearance of the property when one goes down to see it are very often two entirely different things. The descriptions which competent house agents can write about property make any descriptive writer's mouth water. However that may be, the property was advertised. It was advertised locally. I do not say that it was advertised extensively, and I think that it is quite possible that, if more advertising had been done, a better price might have been obtained. But was Mr. Baxter under any duty to do this? I do not think that he was. The law as to what a mortgagee does when he is exercising his power of sale is well settled. I need only refer to a case to which I

referred in argument, *Kennedy v. De Trafford* (1), where LORD HERSCHELL said, at p. 185:

... I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. LINDLEY, L.J., in the court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith," but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

In the same case, LORD MACNAGHTEN said, at p. 192 :

... if a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached.

It is quite impossible to say that Mr. Baxter acted otherwise than in good faith. He had this house on his hands for a long time. A mortgagee, like any other investor, is entitled to cut his loss, and may indeed be very well advised to do it. He did not extensively advertise this property. It would only have been a further expense if he had embarked on a large advertising campaign—I have already said that he spent £15 15s., not a negligible sum, on it—and, if he had embarked on it, it would only have added to his loss. He did not get a single bid at the auction. I cannot see any reason at all why I should say that the property ought to have been offered in London rather than in Maidenhead. Then he employed local agents, who, he thought—and I dare say thought very rightly—given a longer time, might have got a better price. However, I do not think that he is under any duty, unless he wants to, to hold this property for an indefinite time in the hope that somebody may offer another £100. After waiting a very long time, he got this offer of £850, the only genuine offer he ever had for the property, and he took it. That being so, how can there be any different measure of damage as between himself and Mr. Gapp? If he has done all that he can be required to do, so far as realising the property is concerned, you get at once the measure of the loss which he has suffered. The loss which he has suffered is not challenged in this case as a figure. Taking all the various items, and giving loss of interest, which lies in the ordinary way, and insurance premiums and credits allowed, the expenses of the sale, and one thing and another, and giving credit for the purchase price, the plaintiff says that he has suffered a loss of £742 16s. 7d. That, I think, is the measure of the damage which he is entitled, and fairly entitled, to recover from the defendants in this case. I accordingly give judgment for that amount, and, if it is asked for, I think it must be with interest at the rate of $4\frac{1}{2}$ per cent. from June 3.

Solicitors: *Barnard, Taylor & Douglas-Mann* (for the plaintiff); *Nordon & Co.* (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

FISHER v. W. B. DICK & CO., LTD.

[KING'S BENCH DIVISION (Branson, J.), **November 17, 18, 21, 1938.**]*Master and Servant—Contract of service—Yearly hiring—Indefinite hiring subject to reasonable notice—Reasonable notice—Salesman—Grade of salesman.*

The plaintiff entered the employment of the defendants in 1933. The managing director of the defendant company confirmed his appointment on the selling staff as and from Dec. 1, 1933, at a commencing salary of £400 per annum plus out-of-pocket and travelling expenses. Evidence was given on behalf of the plaintiff that in the oil blending and vending trade a salesman was entitled to 3 months' notice, and on the part of the defendants it was stated that nobody under the grade of a director was entitled to more than 3 months' notice. The plaintiff was employed in selling a special kind of oil, and, therefore, unlike other salesmen employed by the defendant company, he was given no particular territory, but travelled all over the country for the purpose of selling this particular oil. It was contended that these facts made his position something more important than that of a salesman and entitled him to longer notice :—

HELD : (i) the contract of service was not an engagement for a year, but for an indefinite period, subject to reasonable notice.

(ii) the evidence given in this case did not support the contention that there was a custom regarding the notice to be given.

(iii) the plaintiff was a salesman specialist, and was not entitled to more than 3 months' notice.

[EDITORIAL NOTE.] The present case deals quite fully with the question of reasonable notice in the case of a salesman. It may be that in other trades the period of notice is not quite the same, but, speaking generally, the decision herein may be applied to all salesmen receiving a substantial remuneration by way of either salary or commission or both. An attempt was made to establish the fact that the plaintiff occupied some position higher than that of a salesman, and the discussion of this matter will be found helpful. Cases of this nature are, of course, largely dependent upon their own facts, but the judgment herein should prove of great assistance on the question of reasonable notice and on the many questions upon which that depends.

AS TO REASONABLE NOTICE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 149, 150, paras. 247-249; and FOR CASES, see DIGEST, Vol. 34, pp. 63-67, Nos. 384-444.]

Cases referred to :

- (1) *De Stempel v. Dunkels*, [1938] 1 All E.R. 238; Digest Supp.; 158 L.T. 85.
- (2) *Fairman v. Oakford* (1860), 5 H. & N. 635; 34 Digest 57, 327; 29 L.J. Ex. 459.
- (3) *Buckingham v. Surrey & Hants Canal Co.* (1882), 46 L.T. 885; 34 Digest 64, 392.

ACTION for damages for wrongful dismissal, or, alternatively, for six months' notice, instead of the three months' notice actually received, or six months' salary in lieu of notice, instead of the three months' salary in lieu of notice actually received. The facts are fully set out in the judgment.

Bernard B. Gillis and N. K. Lindsay for the plaintiff.

John G. Foster for the defendants.

BRANSON, J. : In this case, the story put forward, in brief, is that in 1933 the plaintiff entered the employment of the defendants. He

continued to serve them until Dec., 1937, when the defendants gave him three months' salary in lieu of notice, and he left their employ.

The first question which arises is a question which depends on the true view as to the nature of the contract of service. It was put on behalf of the plaintiff as having been a yearly hiring—that is to say, a contract which is terminable only at the expiration of a year, and perhaps not then without a reasonable notice, but at all events not earlier than the end of the year and upon a date when the complete year of employment finishes. That point, in the main, depends upon the circumstances in which he came to be employed. The material matters are, I, think, first of all, the advertisement in answer to which he went to the defendants and submitted himself for engagement. That was dated Sept. 29, 1933, and reads as follows :

Required by a high-class oil firm, engineering salesman to sell cutting oils . . . Then the applicant is requested to state his age and experience. There followed an interview, at which, according to the plaintiff, he was given to understand that, if he accepted the employment that the defendants offered, he would be entitled to expect something like permanency of employment. I do not know that it is necessary to deal with the matter in any detail, except to say that Mr. Franks, the managing director who interviewed the plaintiff, was prepared in cross-examination to agree that he might have said something about the defendants' employees being a happy family in which people stayed for a very long period. Then comes the letter of Nov. 15, 1933, in which Mr. Franks confirms the interview :

With reference to your interview with the writer, we confirm having engaged you on our selling staff as and from Dec. 1 next, at a commencing salary of £400 per annum plus out-of-pocket and travelling expenses.

Upon that, it is urged upon me by counsel on behalf of the plaintiff that, according to the law of this land, that is creating a yearly hiring. I think that the law in regard to the matter may now be taken from the decision of the Court of Appeal in *De Stempel v. Dunkels* (1). The material question as to whether a hiring should be held to be a yearly hiring or whether it should be held to be an indefinite hiring, terminable by a reasonable notice at any time, was discussed in that case, and, in relation to that, GREER, L.J., said, at p. 246 :

I also think that it is no longer the rule applicable to all cases that an indefinite hiring is a hiring for a year only. In my judgment, POLLOCK, C.B., was right when he said in *Fairman v. Oakford* (2) that there is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances. One of the circumstances which determines matters of this sort may be a custom proved with regard to the particular employment, but there may be other circumstances pointing in the same direction.

Then he refers to *Buckingham v. Surrey & Hants Canal Co.* (3), where the plaintiff was employed as an engineer at a salary of £500 per annum, and was dismissed by three months' notice. GREER, L.J., read an extract from the decision of GROVE, J., in that case, in which he held that the

hiring was a yearly hiring, and that there was nothing to show that the plaintiff had accepted employment upon any other terms, and he held that the plaintiff could not be dismissed until the expiration of one of the years of his service. GREER, L.J., goes on to say, at p. 247 :

A The rule with regard to an indefinite hiring, being, in the absence of a special agreement to the contrary, a hiring for a year, arose out of the hiring of agricultural labourers, which usually took place at a particular time in each year. Undoubtedly, in the last case referred to, it was applied to the engagement of an engineer at £500 a year. I think that it ought not to have been so applied, as it is unreasonable to suppose that either the employer or the engineer contemplated, when they entered into their agreement, that the agreement should be determined other than by reasonable notice.

B Those closing remarks of GREER, L.J., were concurred in by SCOTT, L.J., at p. 261, and I consider, although I think that it may possibly be said that they went further than the decision of that case actually required, that I am bound by it. If I may respectfully say so, they appear to me to state the common sense of the matter. When you are dealing with
C agreements which are not agreements between agricultural labourers and their employers, there is not the same kind of reason for treating the agreement as a yearly hiring, but rather the contrary.

Having heard Mr. Fisher in the witness-box, and having heard Mr. Franks, who was the other party to the contract of service, I am satisfied
D that neither of them thought that this was an agreement for one year which, if neither party said anything about it, would terminate at the end of the first year by effluxion of time. On the contrary, I think that both parties contemplated that it was an agreement which would go on for an indefinite period—probably, as it did, for several years at
E least.

That being the position, the next question is, this being an indefinite agreement subject to reasonable notice, what is the reasonable notice which should be given ? The evidence on the matter stands in this way. So far as the plaintiff is concerned, all that he said in the way of reasonable
F notice was that in this trade the ordinary notice to which a salesman would be entitled was three months. He said, however, that he was in a position superior to that of a salesman, and that he ought to have at least six months' notice. It is said, on the other hand, that in this business of oil blending and vending nobody under the grade of a
G director gets any more notice than three months.

The defendants seek to put their evidence as high as proving a custom in the matter, but, in order to prove a custom, one has to establish a set of terms which is notorious, which is reasonable and which is certain, so that parties contracting with reference to it may know exactly what
H the terms of the contract which are imported by the custom will be. In the present case, the evidence that there is such a custom was given by Mr. Franks, rather, I think, upon the lines of saying that any salesman was entitled to three months' notice, but he gave no evidence as to a customary length of notice for any other employee of a company such as this. Mr. Knowles, who provided the only other evidence in the

matter, said that there was a custom in relation to all the staff below the position of a director, and limited that to three months' notice, but in cross-examination he seemed rather to alter his evidence about that, in the sense that he said that the three months was a maximum, and that he had not heard of any case in the oil trade where more than three months' notice was given to anybody. He says that the usual notice to a salesman is one month, although he would give three months' notice. On that evidence, I think that it would be wrong to hold that there was a custom so clear and definite regarding the notice to be given to the salesmen that any salesman must be taken to know, without further reference, what his length of notice is to be, because it seems that on one view it is three months and on another view it is one month. Of course, it is immaterial, in a sense, in the present case, because the plaintiff has had three months' notice, but it is material when you are considering whether or not a custom has been proved, because it shows such a lack of certainty as prevents the evidence from establishing a custom.

The next thing is, there being no custom as to the length of notice, what is a reasonable notice for the plaintiff to receive in the present case? If he is no more than a salesman, then, according to his own view, he should not get more than three months' notice. However, if he is more than a salesman, then what has that notice to be? It has to be "reasonable." He gave no evidence as to any other notice longer than three months being given to anybody in this trade, and Mr. Knowles, who impressed me as a witness who wanted to help the court by giving the frankest evidence in the matter, said, as I have already mentioned, that he had never heard of any case in the oil trade where anybody under a director had had more than three months' notice given to him. That is very strong evidence that in this trade three months' notice, even if a man is in a position superior to that of a salesman, would be a reasonable notice to give him. I have found nothing which would justify me, in the absence of any evidence that anybody in the oil trade under the status of a director has ever had more than three months' notice, in saying that Mr. Fisher in the present case is entitled to six months' notice, even if it be true to say that his position was a somewhat higher one than that which can be properly described by the term "a salesman." Even if that were so, however, I am not satisfied myself that Mr. Fisher's employment was an employment in any capacity other than that of a salesman.

It is quite plain, and I think one cannot shut one's eyes to it, that the salesmen in the various businesses who send commercial travellers round the country have to do a great deal in the way of finding out what sort of goods are required by the people they interview. They have to find out in what way the goods which they have supplied to these people have failed to satisfy them, and so failed to produce repeat orders. They have to report to their principals and to recommend

changes which they think will make their wares more attractive to those to whom they are trying to sell.

I have already referred to the advertisement upon the question as to the construction of the contract, but I must do so again in order to point out that the advertisement asks for an "engineering salesman."

- A The letter confirming the interview refers to "having engaged you on our selling staff," while the circular letter sent round to all the representatives begins: "This is to advise you that Mr. Douglas W. Fisher has been appointed to our selling staff." Apart from the fact that the plaintiff calls himself, or was allowed to call himself, a production expert or production specialist in cutting oils, there seems to be nothing which places him so far above the category of an ordinary salesman as to make it right to say that he ought to have a special length of notice. The plaintiff gave evidence to the effect that he had been instrumental in discovering (not in the sense of inventing it, but in the sense of rescuing it from oblivion) a particular commodity spoken of as "clear Dixol," and, without being unkind, I think I am bound to say that the evidence in chief which he gave as to his activities in the matter gave one a much more flattering impression of what he had done than that which I have formed at the end of the case, when I have heard the evidence on both sides and considered the whole matter together. A great deal has been made, for example, of a letter which was written to Messrs. Ferranti's on May 16, 1935, in which the defendants said that their production expert, Mr. Fisher, had gone carefully into the matter of the Ilodraw compound, and that, from tests they had made, they found that, if certain things were added to the material in the tank, such-and-such things would follow. That is alleged to show that the plaintiff was not only a salesman but was also concerned with the compounding of oils in order to meet objections. I do not really think that that was the real position, because Mr. Elphick and Mr. Jennings explained that, when complaints arose, Mr. Fisher would take those complaints to them, and they would be the people who would suggest the remedy. So, when one considers the situation, as a matter of fact I think that it would be wrong to hold that Mr. Fisher was more than a salesman specialist. He was a specialist, it is true, but a specialist in the sense, as was pointed out by the witnesses, that amongst all the customers for all sorts of oils which were being vended all over the country by the regular run of representatives there was not a sufficient demand for this particular kind of machine cutting oil in which the plaintiff was specialised to permit of his being given a territory, and it would be a waste of his special knowledge to give him a territory where he would have to deal with all sorts of oil, so that, therefore, the arrangement was that he should have no territory, but should travel all over the place and specialise in this particular form of oil. That does not mean he was in any sense a more important salesman, but merely that his activities were being confined to the selling of this particu-

lar kind of material, and that he was not allowed to include therein the whole range of lubricating and other oils which the defendant company happened to sell. The result is, in my view, that the plaintiff has failed to show that he was entitled to any more than three months' notice, or, rather, three months' salary in lieu of notice which he has already had, and I must enter judgment for the defendants.

Judgment for the defendants with costs.

Solicitors: *Percy Bono & Griffith* (for the plaintiff); *Linklaters & Paines* (for the defendants).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

JOHN v. MENDOZA.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge),
October 24, 25, 1938.]

Bankruptcy—Proof—Agreement not to prove in consideration of promise to pay after bankruptcy—Right of creditor to sue for debt—Estoppel.

The defendant owed the plaintiff a sum of £852 15s. 6d. when, in May, 1935, a bankruptcy notice was served on the latter. On Sept. 4, the defendant was adjudicated bankrupt. Shortly before that date, the plaintiff, who was proposing to prove in the bankruptcy, was asked by the defendant to withdraw his claim. The plaintiff said he did so under protest. Then followed a letter, subsequently lost, in which the plaintiff stated that he did not wish to press his claim, and that he made a gift of the sum in question. In reply, the defendant stated that the letter was written at his request, and that, notwithstanding its contents, he was indebted in the sum of £852 15s. 6d. The debts of which proofs were lodged having been paid in full, the bankruptcy was annulled. The plaintiff pleaded that, notwithstanding the withdrawal of the proof, the original debt was still owing, or, in the alternative, that the letter of the defendant amounted to a promise to pay the amount of the debt in consideration of the proof not being lodged:—

HELD: (i) the plaintiff was estopped from alleging that the debt was still due.

(ii) a debtor against whom a receiving order has been made cannot enter into an agreement to pay the whole amount of a debt upon condition that no proof is lodged.

[EDITORIAL NOTE. The effect of an adjudication in bankruptcy is that the whole estate of the bankrupt is divisible among the creditors in proportion to the amount of their claims thereon. In order that this may be equitably carried out, it is essential that all the creditors should prove for the full amount of their claims or be barred from any further remedy in respect thereof. The arrangement between the debtor and the creditor in the present case would inevitably defeat this object, and the court has found it possible to decide against the plaintiff's contentions both on the ground of estoppel and on that of want of consideration.

AS TO EFFECT OF BANKRUPTCY ON CREDITORS' RIGHTS, see HALSBURY, Hailsham Edn., Vol. 2, p. 262, para. 337; and FOR CASES, see DIGEST, Vol. 4, p. 195, Nos. 1792-1795.]

Cases referred to:

(1) *Re McHenry, McDermott v. Boyd, Levita's Claim*, [1894] 3 Ch. 365; 4 Digest 195, 1795; 64 L.J. Ch. 13; 71 L.T. 502.

(2) *Wild v. Tucker*, [1914] 3 K.B. 36; 4 Digest 590, 5395; 83 L.J.K.B. 1410; 111 L.T. 250.

ACTION for money due under a promise to pay the same in consideration of the plaintiff not proving in the defendant's bankruptcy.

A The facts are fully set out in the judgment.

Linton Thorp, K.C., and *Alban Gordon* for the plaintiff.

J. P. Eddy, K.C., and *G. F. Kingham* for the defendant.

DU PARCQ, L.J. : The plaintiff is suing the defendant for £852 15s. 6d. due, as he says, under an agreement contained in a letter of June 13, 1935. Mr. Gordon has suggested that the case might be put in another way, and that the plaintiff might sue in effect under an agreement which is contained in, or to be inferred from, a letter from the defendant of July 30, 1935, which he says is a promise to pay £852 15s. 6d., the consideration for the promise being that the plaintiff was not to prove in the bankruptcy. That second way of putting the case would have necessitated an amendment of the pleading. I have not given leave to amend, because, in my view, even if the amendment had been made, my decision could not have been affected, and the plaintiff's case would have failed just as much upon that claim as I find that it fails on the claim as pleaded. When one looks only at the statement of claim and the letter upon which reliance is placed, the case looks clear enough. The letter is quite plain in its terms, and undoubtedly from the time when it was written there was an obligation to pay the sum to which I have referred. However, when the facts are investigated, to my mind they show quite conclusively that the legal obligation to pay that amount disappeared as the result of what took place between the parties.

The plaintiff and the defendant were friends. Neither of them was very wealthy, I think, at any material time. On July 25, 1935, a receiving order in bankruptcy was made against the defendant. That followed on a bankruptcy notice which had been served on him in May, 1935. His act of bankruptcy, I understand, was failure to comply with the bankruptcy notice, and on Sept. 4, 1935, he was adjudicated bankrupt. On July 4, 1935, the plaintiff's solicitors had written to the defendant asking for payment of part of what was payable under the agreement—namely, the amount payable under the promissory note—and at the end of July the parties met. The receiving order had been made a few days before that meeting, and a conversation took place regarding which I think that the plaintiff's evidence, although not exactly accurate, is probably approximately correct. The plaintiff was proposing, naturally, to prove in the bankruptcy. He had, it seems, instructed his solicitor to lodge a proof of debt. He says that the defendant was worried, and asked him to withdraw his claim. The plaintiff said that he did not want to do it, but he did agree to withdraw the claim. There had been no proof at that moment. He says that he did that under protest, but

it is quite plain that all he means by "under protest" is that he was persuaded to do it, although at first he did not wish to do it. At the request of the defendant, he then gave to the defendant a letter which the latter has lost. There is, however, no substantial difference about what was in it. In it, he said that he did not wish to press his claim, and that he would give the money then due—£852 15s. 6d. may or may not have been mentioned in the letter as the figure—as a present. He was induced to do that, so he says, because the defendant told him that it would be helpful to him, the defendant, in the bankruptcy proceedings. The defendant said that he was expecting some money, and he added that, when he had cleared up the bankruptcy, he would see what he could do for the plaintiff. To show his good intentions, he wrote the letter dated July 30, 1935, which is as follows :

I thank you for your letter of even date which I requested from you, and notwithstanding its contents I am still indebted to you for the sum of £852 15s. 6d.

The plaintiff is, therefore, saying one of two things. The first is what is pleaded—namely, that the defendant agreed, under letter of June 13, 1935, to pay a sum of approximately £852 15s. 6d., and that, notwithstanding the withdrawal of the proof, he ought, having said that he was still indebted in that sum, to pay it. Alternatively, the plaintiff would say, if he were allowed to do so, that on July 30 there was an agreement to pay the sum of £852 15s. 6d. in consideration of the proof not being lodged.

I do not propose to go through the authorities at length. I think that it is impossible to hold that such a claim may be maintained. First of all, on the facts, I come to the conclusion that what happened was that the defendant, having persuaded the plaintiff to abandon his claim as a claim having any legal validity, had made a promise to pay what is thought may be regarded as a debt of honour. In effect, what he said was : " Give up your claim against me, and rely on me to do my best for you. Then you will have, as a result of my promise, an unenforceable claim which an honourable man would desire to meet if he could do so." I say " if he could do so," because even honourable men, however much they may wish to pay debts of honour, are not always in a position to pay them, and I do not know in what position the defendant is at this moment as regards payment of a claim which, it may be, he would think he ought to pay as a matter of honour. That is a matter with which I have nothing to do.

When one tries to put the claim as Mr. Gordon has tried, one is met by really insuperable difficulties. The result of bankruptcy proceedings usually is that, as a result of the receiving order and the adjudication, all the creditors get what they can on a fair division of the assets of the bankrupt. Obviously, it is vital to such an arrangement that everybody who claims to be a creditor should prove in the bankruptcy, and that there should not be any secret arrangement by which a man should agree not to prove on the terms that he shall at some subsequent date

get a great deal more in the way of a dividend than the other creditors—perhaps as much as 100 per cent. In certain clearly defined circumstances, a bankruptcy may be annulled. The section which deals with that matter is sect. 29 (1) of the Act, which provides as follows :

A Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication.

B I am not concerned here with the words : “ Where . . . a debtor ought not to have been adjudged bankrupt.” In the present case, it was said that the debts of the bankrupt had been paid in full, and for that reason the adjudication was annulled on Apr. 23, 1937.

C It is plain that the court will only make an order annulling an adjudication in bankruptcy under that head of the subsection when it is clearly and conclusively proved that the debts have been paid in full. It is not sufficient now, though it was sufficient under the earlier law, that the creditors all consent to the annulment of the adjudication. It is necessary to prove that the debts of the bankrupt have been paid in full. I look at that order, which, of course, is an order of the High Court of Justice, and find that it is recited in the order as the ground
D on which the adjudication was annulled that it appeared to the court that all the debts of the debtor had been paid in full. If the plaintiff had come forward and said, “ There is owing to me a sum of £852 15s. 6d.”—or, indeed, any sum—then, unless it were shown that he was wrong, and his debt had been paid in full, the order of the court annulling the
E adjudication would never have been made.

In my view, for the purposes of considering whether or not there is an estoppel here, one must treat the plaintiff as having been a party, I do not say to the application to annul, but to the bankruptcy proceedings. He knew that a receiving order had been made. He must be taken to
F have known that it was his duty under the Act, if he desired to claim that he was a creditor, to lodge a proof, because he cannot urge ignorance of the law on his own behalf. He knew that the result of the bankruptcy proceedings might be a receiving order and an adjudication, and, further, that, if there were an adjudication, there might subsequently be an
G annulment, and it was open to him, by proving, to prevent any annulment of the receiving order on the ground that all debts had been paid. In my opinion, on the general principles of estoppel by record, he is just as much estopped after that judgment from coming into another branch of
H the High Court of Justice and contending that after all a debt was due to him as if there had been a judgment to the opposite effect to that for which he now contends in this same Division of the High Court. On that ground, there is an answer to the plaintiff's claim when it is put on the basis pleaded—namely, the letter of June 13, 1935. He is in no better position when he seeks to rely on the letter of July 30, 1935. It seems to me to be quite hopeless to say that a debtor who has had a receiving

order made against him can enter into an agreement with a creditor by which he says: "Do not lodge a proof. Admit formally in a binding way that I do not owe you anything, and thereby disqualify yourself from claiming against me as a matter of law, and I will promise—and this is to be regarded as a binding obligation—to pay you a sum at any rate approximately equivalent to the whole amount of the debt for which you might prove." Such an agreement, if it were allowed to stand, would entirely defeat the whole object of the bankruptcy law. A

Mr. Gordon referred me to *Re McHenry, McDermott v. Boyd, Levita's Claim* (1). What was held there was that, where, under the old law, an adjudication of bankruptcy could be annulled, provided all the creditors consented, there was no duty to tell the court how they had been persuaded to consent. That really throws no light on the present case. Then Mr. Gordon referred me to a decision of ATKIN, J., in *Wild v. Tucker* (2), where it was held that an undischarged bankrupt may agree to pay in full a debt due from him at the commencement of bankruptcy and provable in the bankruptcy in consideration of a small loan. That is not anything like this case. In my view, there was no consideration here. The letter of July 30, 1935, was a mere promise to pay approximately the amount to which the plaintiff had given up his claim. B C

I do not propose to go through all the sections of the Bankruptcy Act to which I was properly referred by Mr. Eddy. I think that in this case the plaintiff abandoned, and effectively abandoned, his claim. I think that he has never taken any successful step to get a new agreement for fresh consideration to pay him an equivalent amount, and that his action fails, and there must be judgment for the defendant. D E

Judgment for the defendant, with costs.

Solicitors: *Thorp, Saunders & Thorp* (for the plaintiff); *Beckingsales & Naylor* (for the defendant).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.] F

GOLDBLUM v. GOLDBLUM.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.J.J.),
November 21, 1938.]

Divorce—Bars to relief—Res judicata—Same charges of cruelty in previous petition—Previous petition dismissed by consent—Separation deed—"Will forthwith withdraw the said petition."

On Oct. 31, 1933, a wife presented a petition for judicial separation founded on cruelty. On Jan. 19, 1934, the parties, in compromise of those proceedings, entered into a separation deed, and 5 days later the petition was dismissed by consent. On May 26, 1938, the wife presented a petition for divorce founded on cruelty, the allegations of cruelty being the same as those in the earlier petition, except for one added paragraph. The deed of 1934 provided that the petitioner would forthwith withdraw the petition for judicial separation. It was contended that the wife was precluded by what had happened in 1934 from making the same allegations of cruelty the basis of the further petition :—

HELD : (i) the dismissal by consent did not in itself amount to a withdrawal of the charges of cruelty.

(ii) whether or not the charges were in fact withdrawn must be decided upon the construction of the separation deed, and the phrase "withdraw the petition for judicial separation" did not, in the circumstances, amount to a withdrawal of the charges of cruelty.

[EDITORIAL NOTE. It was not contended in this case that the mere dismissal by consent of the petition for judicial separation was in itself sufficient to prevent the bringing of a further petition based on the same allegations but that a withdrawal of the charges could be found in the terms of the separation deed. The case has an added importance because of the fact that very many petitions for judicial separation founded on cruelty have in the past been dismissed by consent upon the execution of a deed of separation.

AS TO REPETITION OF SAME CHARGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 670-673, paras. 990-994; and FOR CASES, see DIGEST, Vol. 27, pp. 324-326, Nos. 3026-3051.]

Cases referred to :

- (1) *Hall v. Hall & Richardson* (1879), 48 L.J.P. 57; 27 Digest 325, 3038; 40 L.T. 525.
- (2) *H— v. H—*, [1938] 3 All E.R. 415; Digest Supp.; 159 L.T. 525.
- (3) *Rowley v. Rowley* (1866), L.R. 1 Sc. & Div. 63; 27 Digest 325, 3039; 35 L.J.P. & M. 110.
- (4) *Re South American & Mexican Co., Ex p. Bank of England*, [1895] 1 Ch. 37; 21 Digest 147, 103; 64 L.J.Ch. 189; 71 L.T. 594.
- (5) *Norman v. Norman*, [1908] P. 6; 27 Digest 343, 3245; 77 L.J.P. 8; 98 L.T. 61.
- (6) *Rose v. Rose* (1883), 8 P.D. 98; 27 Digest 362, 3470; 52 L.J.P. 25; 48 L.T. 378.
- (7) *Stafford v. Kidd*, [1937] 1 K.B. 395; [1936] 3 All E.R. 1023; Digest Supp.; 106 L.J.K.B. 193; 156 L.T. 75.

APPEAL from an order of HENN COLLINS, J., dated Oct. 31, 1938, dismissing an application by the husband, the respondent in divorce proceedings, asking for dismissal of the petition on the ground that identical charges of cruelty were the subject of a previous petition for judicial separation. The facts are fully set out in the judgment.

J. W. Morris, K.C., and *S. E. Karminski* for the appellant.

Gilbert Beyfus, K.C., and *Henry H. Harris* for the respondent.

Morris, K.C. : The dismissal of a petition in itself does not operate as an estoppel, but, if the petition is dismissed as the result of an arrangement made between the parties, it is otherwise. The wife assented to the dismissal of the earlier petition as part of the agreement between her and her husband. That amounted, by consent, to a dismissal of the charges, and the wife ought not, afterwards, to be allowed to present a fresh petition. By compromising the suit, the wife has compromised the charges on which it was based. The wife has had the benefit of the agreement and is now seeking to go back upon it. [Counsel referred to *H—— v. H——* (2), *Rowley v. Rowley* (3), *Hall v. Hall & Richardson* (1) and *Re South American & Mexican Co., Ex p. Bank of England* (4).] A B

Beyfus, K.C. : Unless there is to be a reversal of the long-established position under which there is no estoppel in the mere dismissal by consent of a petition, the only question to be considered is the effect of the agreement. Is there anything to say that there is sufficient to prevent the petitioner from saying that, since the marriage, the husband has treated her with cruelty? A condition would have to be implied that the wife should withdraw the charges of cruelty, as well as withdraw the petition. If there is to be an implied term in the agreement, it must be a term which it is necessary to imply in order to give reasonable efficacy to the agreement. In the present case, it was not necessary, in order to give efficacy to the transaction, to imply that the wife wholly withdrew the charges she had made. When the husband expressed himself as willing to give to the wife all she could have got from the court, it became unnecessary to continue the proceedings. In the present case, the deed is drawn up in very narrow terms. [Counsel referred to *Norman v. Norman* (5) and *Rose v. Rose* (6). He was stopped by the court.] C D E

Morris, K.C., in reply : By consenting to have the petition dismissed, the wife has done something more than withdraw the charges. [Counsel referred to *Stafford v. Kidd* (7) and *Norman v. Norman* (5).] F

SIR WILFRID GREENE, M.R. : The point raised here is one of some general importance. The parties were married in 1928, and on Oct. 31, 1933, the wife, the petitioner in the present divorce proceedings, presented a petition for judicial separation. That petition contained certain allegations of cruelty. On Jan. 19, 1934, before that petition had come on for hearing, the parties entered into a separation deed under which the petition was to be dismissed. I will come back to the terms of that deed in a moment. On Jan. 22, 1934, pursuant to the provisions in the deed, the wife took out a summons asking for the petition to be dismissed, and an order to that effect was made on Jan. 24, 1934. The order is as follows : G H

Upon hearing the solicitors for the parties and by consent I do order that the petition filed herein on Nov. 1, 1933, be dismissed.

On Jan. 1, 1938, the Matrimonial Causes Act, 1937, came into force,

and by sect. 2 of that Act for the first time cruelty since the celebration of the marriage was made a ground for the presentation of a petition for divorce. On May 26, 1938, the wife presented the petition which is the subject-matter of the present application. That petition was based on the ground of cruelty, and on that ground alone. In it she repeats
A in terms the allegations of cruelty made in the earlier petition, together with one added paragraph. The object of the husband's application was to obtain the dismissal of that petition upon the ground that the wife was precluded by what had happened in Jan., 1934, from making those allegations of cruelty a basis for the presentation of any further
B proceedings in the Divorce Court, and in particular the present proceedings for divorce. HENN COLLINS, J., as I have said, dismissed the husband's application, and this appeal results.

It is not suggested by Mr. Morris, on behalf of the husband, that the mere dismissal by consent of the petition for judicial separation was by
C itself sufficient to prevent the charges of cruelty made in that petition from being relied upon in the present proceedings. If authority were required for that view (which Mr. Morris accepted), it is to be found in *Hall v. Hall & Richardson* (1), a decision of SIR JAMES HANNEN in 1879. It is said, however, that in the present case there is something more
D than a mere dismissal by consent, and that the contract which the parties entered into—namely, the separation deed of Jan. 19, 1934—upon its true construction has the effect of preventing the wife from relying upon those charges. The matter, in my judgment, depends upon the true meaning and effect of that document, and it is necessary
E to examine its terms. It recites unhappy differences, by reason whereof the parties have agreed to live separate and to enter into the arrangement thereafter expressed. Then it witnesses by cl. 1 that the parties shall live separate and that neither one will take proceedings against the other for restitution of conjugal rights or molest, annoy or interfere
F with the other. In cl. 2, the husband agrees to pay to the wife a sum of money to provide for debts for necessities incurred by her and her costs incidental to the petition. Then it says: “. . . which proceedings are to be discontinued as hereinafter mentioned.” It is to be noticed that the word “discontinued” there is not an accurate word,
G because such proceedings cannot be discontinued. Then comes cl. 3, under which, subject to the wife observing the conditions of the deed, the husband agrees to pay her a weekly sum. Then there are certain other provisions to which I need not refer. Clause 7 provides for the deed becoming void if the parties should become reconciled or if their
H marriage should be dissolved. Clause 8 is in the following terms:

The said Dessa Goldblum will forthwith and before Feb. 2 next withdraw the said petition for judicial separation.

The phrase “withdraw the said petition” is again inaccurate, because petitions cannot be withdrawn. Nevertheless, both the phrases “proceedings are to be discontinued” and “withdraw the said petition”

mean, in my opinion, nothing more than that the petition will be got rid of by proper procedure in the Divorce Court, which is dismissal by consent. The parties, therefore, are agreeing that the petition shall be dismissed by consent. Pursuant to that, they came before the registrar by their solicitors, and acknowledged their consent, and the order which I have mentioned was made. It is perfectly clear to my mind that in this document there is no express undertaking by the wife to withdraw any of the charges that she had made, nor is there any undertaking by her not to make those charges the foundation of future proceedings of some kind in the Divorce Court. To what extent, if at all, the agreement might have prevented her from taking proceedings for judicial separation based on precisely the same allegations it is not necessary now to inquire. The question with which we are concerned is whether the true effect of that document, when properly construed, is to preclude her from taking the present proceedings for divorce and, in support of those proceedings, alleging the same acts of cruelty. As I have said, there is no express term to that effect, but Mr. Morris says that the phrases "proceedings are to be discontinued" and "withdraw the said petition" are equivalent to the withdrawal of the charges made in the petition. As a matter of construction of the deed, I am quite unable to take that view. They are two quite different things. The obtaining of a dismissal of a petition by consent is a thing which in the divorce practice does not, as I have pointed out, by itself produce the sort of estoppel which is desired. There is all the difference between that and withdrawing charges or agreeing not to bring further proceedings in the Divorce Court. Provisions in separation deeds of the latter character are well-known, and there have been many decisions dealing with them, but the present document is completely silent upon any such matter, and I am unable to extract from the phraseology used any such withdrawal or undertaking.

Mr. Morris relied upon certain authorities, and in particular a decision of SIR BOYD MERRIMAN, P., in *H— v. H—* (2). That is an authority which, when properly understood, is, in my opinion, against Mr. Morris, and not in his favour. That was a case where the wife in 1929 presented a petition for judicial separation, alleging cruelty. That petition was compromised upon the terms, among others, that all charges of cruelty were withdrawn, that a deed of separation was to be drawn up between the parties, and that in the meanwhile, pending the execution of such a deed, the cause was to be placed in the reserve list. The terms were made part of the order of the court. The wife, subsequent to the coming into force of the Act of 1937, presented a petition for divorce, charging the same cruelty as that alleged in the former petition. It was held by SIR BOYD MERRIMAN, P., that that petition was barred by the deed. The important matter to observe is the reasons why he so held. First of all, it is to be noted that there was not in that case any formal order, as in the present case, dismissing the petition by consent, but the absence

- of such an order was treated (and, if I may say so, quite rightly treated) by SIR BOYD MERRIMAN, P., as being a mere matter of form. He regarded the getting rid of the petition by an actual formal order as a matter which really did not affect the substance of the question. Had he done otherwise, he would have treated the absence of that order as being in some way a crucial matter in the case, but he did not do so. The point that he went on to examine—and it is, in my judgment, the same point as that which arises in this case—was the true construction of the deed. The deed there in terms provided that all charges of cruelty were withdrawn, and in face of that SIR BOYD MERRIMAN, P., held that it was quite impossible to rely upon those charges in some subsequent proceedings in the Divorce Court, although those subsequent proceedings were not of the same nature. He referred to several previous authorities, and he pointed out that the words “shall not institute proceedings in the Divorce Court” (which is one of the forms found in one of the cases to which he referred) and “withdrawal of charges” meant the same thing. On that construction, it was obviously impossible for the petition in that case to be supported. The other authority that was referred to was *Rowley v. Rowley* (3). That again was a case where the wife had endeavoured to obtain a decree of divorce *a mensa et thoro* on the grounds of cruelty and adultery, but she ultimately failed in those proceedings. Subsequently, after the establishment of the Divorce Court, she presented a petition in that court praying for dissolution on the grounds of cruelty and adultery, and the petition contained several charges of cruelty. Before that petition was adjudicated upon, and apparently after the trial had got some little way, the parties came to an agreement, and they signed a document under which a juror was to be withdrawn and the petitioner was to move at the proper time to have the petition taken off the file, the respondent consenting to the application. There was an undertaking by the respondent to execute a deed of separation, and then it ended up with these words :

The petitioner undertaking not to institute other proceedings in the Divorce Court.

- The lady subsequently, in the teeth of that agreement, endeavoured to get her petition on for hearing again, and in that effort she failed, after having carried the matter to the full court. The position, therefore, in that case again, as in *H—— v. H——* (2), was that, although the parties had agreed that the petition should be formally disposed of, that actual step had never been taken, but the court had refused to allow her to proceed with the petition. There again, for all substantial purposes, the petition had been got rid of pursuant to the agreement. Afterwards she presented a fresh petition in the Divorce Court, praying for dissolution of her marriage by reason, as she alleged, of her husband's adultery and cruelty. This petition contained paragraphs charging the same acts of cruelty as were alleged in her original petition, but it also charged further acts of adultery which had come to her knowledge. The other paragraphs

charged acts of cruelty identical with those alleged in her original petition. Accordingly, as at that date it was necessary to establish cruelty before she could obtain a divorce, it was necessary for her to be able to establish those acts of cruelty. The question was whether, in view of her agreement, she was entitled to rely upon them. LORD CHELMSFORD, L.C., at the beginning of his opinion said, at p. 67 :

My Lords, the whole question, in this case, turns upon the meaning of the words in the agreement : " The petitioner undertaking not to institute other proceedings in the Divorce Court." It appears to me to be difficult to apply any other than one meaning to these words. It is not contended that they amount to an undertaking never to institute any other proceedings. But they seem to have been intended to prevent future proceedings in respect of matters forming the ground of a petition for a divorce which had occurred prior to the agreement.

On that construction of the document, the answer was perfectly clear. The important point in that case is that the matter was decided, not upon the ground that the petition ought to have been dismissed by a formal order, or that any such formal order would have produced any different result, but upon the exact language that the parties used in the agreement, language which in that case was wide enough to preclude the wife from instituting those proceedings. In the present case, such language is entirely absent. I am not prepared, and I do not think that the court would be entitled, to read into this document words which are not to be found in it. The insertion of words of that kind in these deeds is a common matter, and the parties in this case have left them out. That being so, the consequence must follow that Mr. Morris, in my judgment, fails to establish that which it is necessary for him to establish—namely, that the deed of separation, coupled with the formal order for dismissal, is sufficient to produce the result claimed. As I have said, the mere existence of that formal order for dismissal does not, in my judgment, really strengthen the case in any way. The position would have been the same in any case, and the arguments would have been, or should have been, precisely the same if the formal step of obtaining that particular order pursuant to the agreement had never in fact been taken, as it was not taken in *H— v. H—* (2), and *Rowley v. Rowley* (3). In the result, the appeal is dismissed with costs.

SCOTT, L.J. : I agree, and have nothing to add.

CLAUSON, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Kenneth Brown, Baker, Baker* (for the appellant) ; *Bennett, Bennett & Rabin* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re PHILLIPS, PUBLIC TRUSTEE v. PHILLIPS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
November 11, 1938.]

Executors—Administration—Inquiry as to persons entitled—Costs—Testamentary expenses—R.S.C., Ord. 65, r. 14B.

The testator left the residue of his estate as to one-third to a named person and as to the other two-thirds to his nephews and nieces living at his death. An inquiry was necessary to ascertain who were the nephews and nieces entitled. The will contained a direction that testamentary expenses were to be paid out of residue. It was contended that the costs of the inquiry were testamentary expenses, but an order was made that they should be paid out of the share given to the nephews and nieces:—

HELD: the order was rightly made, and the direction to pay testamentary expenses was not sufficient to throw the costs of this inquiry upon the residue.

[EDITORIAL NOTE. R.S.C., Ord. 65, r. 14B, provides that the costs of inquiries of this nature are to be thrown upon the particular legacy, but the authorities show that a direction by the testator to pay testamentary expenses out of residue is sufficient in some cases to justify an order that these costs shall be paid out of residue. It would appear, however, that for this to be so the difficulty must arise from the ambiguity of the language used by the testator. In the present case, there was no such difficulty, and to throw these costs upon the residue would have penalised the legatee in respect of the one-third share as to which no inquiry was necessary.]

AS TO COSTS OF INQUIRIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 458, 459, paras. 878, 879; and FOR CASES, see DIGEST, Vol. 24, pp. 851, 852, Nos. 8853-8867. See also YEARLY SUPREME COURT PRACTICE, 1939, pp. 1486, 1486.]

Cases referred to:

- (1) *Re Whitaker, Denison-Pender v. Evans*, [1911] 1 Ch. 214; 24 Digest 851, 8859; 80 L.J.Ch. 63; 103 L.T. 657.
- (2) *Re Groom, Booty v. Groom*, [1897] 2 Ch. 407; 24 Digest 851, 8854; 66 L.J.Ch. 778; 77 L.T. 154.
- (3) *Re Vincent, Rohde v. Palin*, [1909] 1 Ch. 810; 24 Digest 851, 8858; 78 L.J.Ch. 455; 100 L.T. 957.
- (4) *Re Baumgarten, Bevan v. Rosenbaum* (1900), 82 L.T. 711; 24 Digest 848, 8828.
- (5) *Re Townend, Knowles v. Jessop*, [1914] W. N. 145; 24 Digest 852, 8860.

APPEAL from an order dated July 25, 1938, made by the Vice-Chancellor of the County Palatine Court of Lancaster. The testator's will contained a direction that funeral and testamentary expenses and debts were to be paid out of residue, and that the remainder was to be held upon trust as to one-third for a named person and as to two-thirds for the nephews and nieces of the testator living at his death. The matter came before the Vice-Chancellor on July 12, 1937, and he directed an inquiry as to the nephews and nieces of the testator living at his death. On July 25, 1938, the Vice-Chancellor made an order and directed the costs to be paid out of the share of two-thirds of the residue given to the nephews and nieces. It was contended on behalf of the nephews

and nieces that these were purely testamentary expenses, and should be charged on the estate.

G. Maddocks for the appellant.

P. Ingress Bell for the respondent, a residuary beneficiary.

H. S. Barker for the Public Trustee, the executor of the will.

Maddocks: Ord. 52, r. 2 (b), of the Palatine Court is the same as A
R.S.C., Ord. 65, r. 14B. This is a simple case, in which there are no
continuing trusts. No question arises as to whether the costs were
different from administrative expenses, which it has been sought, on
some occasions, unsuccessfully to distinguish from testamentary expenses.
Whatever may be said as to the expenses which may be incurred by a B
trustee in the course of administering a long continuing trust, where the
testator has expressly provided that testamentary expenses shall be
raised and paid out of the estate at a particular point of administration,
the rule cannot be applied so as to vary the order of disposition directed
by the testator in a case such as this. It is an *ultra vires* application of C
a rule if its application deprives a beneficiary of any part of the testator's
bounty. My clients are entitled to have these costs paid as testamentary
expenses. The testator must be presumed to have intended everything
which would flow from the words he used.

Bell: The direction in the will in itself is not sufficient reason why D
the rule should not apply. The mere direction regarding testamentary
expenses has not in the past induced the court to disregard the rule.
There is a person named in the will as the person to take, and that
person is clearly identified. There is also a class gift given to people
whom the testator did not know, and an inquiry was necessary to find E
out who they were. The legatee for whom I appear was not a defendant
at the hearing. The authorities are in my favour, and an exaggerated
importance should not be given to the formal phrase of giving effect
to the intentions of the testator. [Counsel referred to *Re Vincent*,
Rhode v. Palin (3), *Re Baumgarten*, *Bevan v. Rosenbaum* (4), *Re Whitaker*, F
Denison-Pender v. Evans (1), *Re Groom*, *Booty v. Groom* (2) and *Re*
Townend, *Knowles v. Jessop* (5).]

SIR WILFRID GREENE, M.R.: This appeal from a decision of the
Vice-Chancellor of the County Palatine of Lancaster raises a short G
question as to the operation of the Rules of the Palatine Court, Ord. 65,
r. 2 (b). That rule is in the same words as is R.S.C., Ord. 65, r. 14B,
and provides as follows:

The costs of inquiries to ascertain the person entitled to any legacy, money, or
share, or otherwise incurred in relation thereto, shall be paid out of such legacy,
money, or share, unless the judge shall otherwise direct. H

The language of that rule is clear. It is a direction that the costs shall
be paid in a particular way unless the judge shall otherwise direct,
and that can be expanded by saying unless there are circumstances
in the case which, in the discretion of the judge, seem to him sufficient
to make it right to give such a direction.

In the present case, the question arises in reference to the will of Mr. John Rowbotham Phillips, who died on Mar. 23, 1936. By his will, after a devise of his dwelling-house, he gives the residue of his estates to his trustee upon trust to sell :

A . . . and out of the proceeds thereof to pay my funeral and testamentary expenses and all death duties and other moneys which are payable out of my estate and shall stand possessed of the residue thereof upon trust as to a one-third part thereof to my said housekeeper Alice Potter absolutely and as to the remaining two one-third parts thereof in trust for my nephews and nieces the children of my two brothers James Albert Phillips and George Arthur Phillips living at my death in equal shares.

B Then there is a proviso for the case of nephews and nieces who might die in his lifetime, an event which did not happen.

The Public Trustee, who was the trustee of the will, set himself to ascertain the nephews and nieces referred to in the will, and he ascertained that George Arthur Phillips had two children living at the date of the testator's death, and they are the respondents to the petition.
C The case of James Albert Phillips was more difficult. The Public Trustee received some information which turned out to be inaccurate, and, not knowing what the position was, he presented a petition to the Chancellor of the Duchy. In that petition he asked for an inquiry as to :

D What children (if any) of the testator's brother James Albert Phillips in his said will named were living at the death of the testator—namely, Mar. 23, 1936—or had died in his lifetime leaving any and what issue living at such date.

The latter part is irrelevant. The inquiry was duly answered, and the persons in question were William Albert Phillips, and Eleanor Adelaide Lauda Phillips for whom Mr. Maddocks appears. When the matter
E came before the Vice-Chancellor on further consideration, he made an order for taxation of costs, as between solicitor and client, of the petitioner and the defendants and the parties attending, and he ordered that such costs be paid out of the two-thirds part of the testator's residuary estate given in trust for the children or issue of deceased children of James
F Albert Phillips and George Arthur Phillips. That order is challenged. It is said that, in view of the direction in the will to pay the "testamentary expenses and other moneys which are payable out of my estate," coming, as it does, before the distributable residue is ascertained, the Vice-Chancellor ought to have given the direction which the rule em-
G powers him to give, throwing the costs of the inquiry upon the residue as a whole. It is not suggested—and, indeed, could not be suggested—that the rule is in any way *ultra vires*. The way the case was put was this. It was said that, having regard to the direction for the payment of testamentary expenses, a direction which had to be fulfilled before
H the distributable residue could be ascertained, the judge ought to have ordered the costs to be borne by the residue, and, consequently, that we are entitled to interfere with the exercise of his discretion.

It is to be noticed that there was no difficulty whatsoever with regard to ascertaining the person entitled to the other one-third. She was a named legatee, and there was no difficulty about her at all. The only

difficulty arose in relation to the remaining two-thirds, and it was caused, not by any difficulty of construction of the will, but by the difficulty of ascertaining the identity and whereabouts of the children in question.

Certain authorities were referred to in support of the view that the Vice-Chancellor exercised his discretion on some wrong principle when, in spite of the direction to pay testamentary expenses out of residue, A he ordered the costs to be paid out of the shares in question. I am quite unable to find that these authorities establish any such proposition. The fact that a testator has directed his testamentary expenses to be paid is one which no doubt ought to be taken into account by the court, but it is not by itself necessarily conclusive. It would be highly un- B desirable to attempt to lay down regulations with regard to the application of the rule in question. Suffice it to say that, in my opinion, the discretion which the judge has under the rule is one which he is entitled to exercise against giving the direction mentioned, in a case where there is nothing to suggest that he ought to give the direction beyond C a mere provision for payment of testamentary expenses. It seems to me that there is nothing in the present case beyond that mere provision, and, by itself, I do not think that it has the compelling force which Mr. Maddocks suggests. In fact, he must say, in order to succeed on this application, that the Vice-Chancellor was bound as a matter of law D to give the direction, because, if he was bound as a matter of law, he had no discretion such as that which he conceived himself to have. I am quite unable to read the general language of this rule in any such way, and I am fortified in that view when I find that NEVILLE, J., in *Re Whitaker, Denison-Pender v. Evans* (1), says, at p. 218 : E

The words of the rule are general, and I do not think that the judge was intended to "direct otherwise" merely because the costs of the inquiries are costs of general administration.

In *Re Groom, Booty v. Groom* (2), NORTH, J.—it is true only by way of *dictum*—expressed the same view. It is fair to observe, however, that F the *dicta* of judges who are accustomed to deal with questions of this kind every day in the Chancery Division ought to have attributed to them considerable force in these matters, embodying, as they do, their knowledge and experience of what the practice is and of the way in which other judges have been in the habit of regarding the application of the G rule. In the result, the appeal is dismissed with costs.

SCOTT, L.J. : I agree.

CLAUSON, L.J. : I agree.

Appeal dismissed with costs. H

Solicitors : *T. A. Needham & Son* (for the appellant); *Cobbett, Wheeler & Cobbett* (for the respondent and the Public Trustee).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

RACECOURSE BETTING CONTROL BOARD v. WILD.

[KING'S BENCH DIVISION (Macnaghten, J.), **November 7, 8, 9, 1938.**]

Income Tax—Deductions against profits—Licence to use buildings—Annual payment for licence—Declaration that part of payment in respect of capital cost of construction of buildings.

A For the purpose of operating a totalisator, the owners of a racecourse erected certain buildings and granted to the Racecourse Betting Control Board a licence to use those buildings in consideration of a yearly payment. This payment was stated to be $12\frac{1}{2}$ per cent. of the cost of the construction of the buildings, but it was further provided that, whatever the cost of the construction might be, the annual payment should not be less than $12\frac{1}{2}$ per cent. of £23,000 or more than $12\frac{1}{2}$ per cent. of £27,000. There followed a declaration that this annual sum was a yearly consideration in respect, not only of the enjoyment and exercise of the right of user, but also of repayment by yearly instalments of the capital value of the cost of construction. The question was whether such annual payment was wholly a revenue payment or whether it was in part (that is, in respect of the part applied to repayment of capital) a capital payment:—

C **HELD:** the annual payment was a revenue payment, and, therefore, deductible in computing the profits of the board.

EDITORIAL NOTE. Looking at the payment from the point of view of the payer—in this case, the Racecourse Betting Control Board—the payment here in question seems clearly to be a revenue payment. It does not lose this character because, when looked at from the point of view of the payee, it has the appearance of a capital payment. The declaration which the parties chose to include in their agreement no doubt introduces a difficulty, but it is decided that that declaration has not the effect of converting into a capital payment what is otherwise a revenue payment.

E **AS TO DEDUCTION OF PAYMENTS IN RESPECT OF PREMISES,** see HALSBURY, Hailsham Edn., Vol. 17, pp. 156-158, paras. 321-324; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.]

Cases referred to:

(1) *Inland Revenue Comrs. v. Adam*, [1928] S.C. 738; Digest Supp.; 14 Tax Cas. 34.

F (2) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490.

(3) *Boyce v. Whitwick Colliery Co., Ltd., Coalville Urban District Council v. Boyce* (1934), 151 L.T. 464; Digest Supp.; 18 Tax Cas. 655.

G **CASE STATED** under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The Racecourse Betting Control Board was created in 1928 for the purpose, *inter alia*, of operating totalisators by reference to the provisions of the Racecourse Betting Act, 1928. Under an agreement of June 14, 1934, which H is fully referred to in the judgment, certain buildings were to be erected on the Manchester Racecourse according to plans approved by the board for the purpose of housing totalisators, and the board was granted a licence to use those buildings upon terms including money payment. In respect of the rights of user granted by the deed, and also in respect of repayment by yearly instalments of the capital value of the cost to

the company of constructing the buildings, the board was to pay to the racecourse owners $12\frac{1}{2}$ per cent. of the agreed cost of the buildings, which was £27,500. The board contended that the whole sum paid by them was wholly and exclusively laid out or expended for the purposes of the trade of the board, and was, therefore, deductible in computing the profits of the board for the purpose of assessment to income tax under Sched. D, Case I. On behalf of the inspector of taxes, it was contended that the part of the payment made in repayment by yearly instalments of the cost of erecting the buildings was capital expenditure, and, therefore, not deductible. The commissioners decided in favour of the latter contention. A

A. M. Latter, K.C., and J. S. Scrimgeour for the appellants. B

The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the respondent.

MACNAGHTEN, J. : The question at issue on the appeal is whether an annual sum paid by the appellants, the Racecourse Betting Control Board, for the use of a certain building erected on the Manchester Racecourse under a deed made between the Manchester Racecourse Co., of the one part, and the board, of the other part, dated June 14, 1934, should be treated, for the purpose of ascertaining the board's liability to income tax, as a revenue payment or as a capital payment. The board contends that it is a revenue payment and should be deducted from its receipts. I apprehend that the Manchester Racecourse Co., when their accounts are taken for the purposes of income tax, may put forward the view that the money received by them under the deed is not a revenue receipt, but is a capital receipt. However, the only question here is whether, for the purpose of arriving at the proper assessment of profits of the board, this payment is to be treated as revenue expenditure or whether it is to be treated as capital expenditure. The answer to that question must depend on the provisions of the deed under which the payment is made. The board is a body corporate constituted in 1928 under the Racecourse Betting Act, 1928, and the deed recites that the board has granted to the company a certificate of approval under the provisions of the Racecourse Betting Act, 1928, s. 3 (1), and that : C
D
E
F

The company is about to erect buildings on part of the site of the race-course at an estimated cost of between £25,000 and £27,000 in accordance with plans submitted and approved by the board, for the purpose of a totalisator being operated therein as defined by the said Act and the board are desirous of having a licence to use such buildings when completed for the said purpose. G

The deed further recites that the company have agreed to grant the board such a licence on terms set out in the deed. Clause 1 provides as follows : H

The company hereby grants to the board for a term of 21 years (determinable as hereinafter mentioned) from Sept. 7, 1934, or from such other day as the buildings are first used for the purpose of operating a totalisator therein the sole and exclusive right to enter upon and erect and operate a totalisator in the said buildings together with the right at all reasonable times for the board its officers staff and servants

to pass and repass with or without workmen horses carts motors and other vehicles over and along the other property of the company.

Then comes a proviso which enables the Manchester Racecourse Co. to determine the licence, if the payments made by the Racecourse Betting Control Board are in arrear for 21 days after the respective dates on which, A the same ought to be paid, or if there shall be any breach of any of the covenants and agreements on the part of the board thereafter contained in the deed, or if the site of the buildings shall be compulsorily acquired by the local authority.

Clause 2 provides for the annual payment, which is the subject-matter B of the present dispute :

The board shall during the continuance of this licence pay to the company by four equal quarterly payments (the first of such payments to be made on the 24th day following the date when the buildings are first used for the purpose of operating the totalisator and such quarterly payments to be made thereafter at intervals of 3 months) an annual sum at the rate of £12 10s. per centum of the C cost of construction of the said buildings.

It is provided, however, that, whatever the cost of the construction of the buildings may be, the annual payments are not to be less than 12½ per cent. on £23,000 or more than 12½ per cent. on £27,000.

Then there comes a declaration which does not purport to confer, D and does not in fact confer, any rights or obligations on either party. It is merely a declaration to all whom it may concern, and is in these words :

It is hereby declared that the annual sum to be paid by the board to the company under the provisions of this clause is a yearly consideration in respect not only of the enjoyment and exercise of the right hereinbefore granted but also in repayment E by yearly instalments of the capital value of the cost to the company of constructing the said new buildings.

Various suggestions have been put forward why the parties thought it worth while to make this declaration, and for whose benefit or to whose detriment it was intended. Although the language of the declaration F is open to criticism, its meaning is clear enough—namely, that the annual sum was to be paid for the right to use the buildings, and that it was fixed at such an amount as would in time recoup to the company the cost of its erection. It does not seem to do more than state expressly what might reasonably be inferred from the fact that 12½ per cent. of G the capital cost of the building up to the amount of £27,000 was to be paid. A person who erects a building and obtains a rent of 12½ per cent. upon its cost is plainly getting something more than an ordinary return on the investment of money.

The remainder of the deed does not, I think, throw any light upon H the question which is at issue, except that it states that nothing in the deed was to operate as a demise of any part of the company's premises, and, nevertheless, the company agrees to pay during the continuance of the licence "all rates, taxes and other impositions which may at any time hereafter be assessed or charged on the said buildings," and, if the amount of the rates and taxes and other impositions shall in any year

exceed the sum of £800, the excess over a certain sum shall be paid by the board to the company. In consequence of that provision, the board is interested in the amount of the Sched. A assessment, and in the amount of the rateable value of the building. That perhaps may be the explanation why this declaration was inserted in the deed. It may have been inserted with a view to getting a more favourable assessment of the building than would otherwise have been the case. A

Except for that declaration, it seems clear that the annual sum must, for the purpose of income tax assessment, be regarded as a revenue payment. Mr. Latter, arguing for the board, said that, but for the insertion of the declaration in the deed, the Crown would not have a leg on which to stand. The Solicitor-General would not go quite so far as that, but he did say that it would be a crutch rather than a leg upon which he would have to support himself. B

A number of cases have been cited to me. The Solicitor-General relied strongly on *Inland Revenue Comrs. v. Adam* (1). In that case, a catering contractor who, for the purpose of his business, wanted a dump upon which he could deposit material entered into an eight-years' agreement by which he undertook to deposit on certain land a minimum of 80,000 cubic yds. of material in the period, at the rate of 10,000 cubic yds. per annum. The price to be paid by him to the land-owner was £3,200, payable by half-yearly instalments of £200. In that case, it was held by the Court of Session, LORD CLYDE and LORD SANDS, LORD BLACKBURN dissenting, that these half-yearly payments of £200 were capital payments. LORD CLYDE said, at p. 743: C

A great deal has been said about form and substance. I think that, in a question of this sort, both form and substance must be considered; because the form of the transaction by which the respondent acquired the right to dump waste soil may bear very materially on the question of the capital or revenue character of the outlay made to acquire it. Suppose that the consideration for the right had been an annual rent of the site stipulated for as such, it would, I think, have been difficult to displace the view that the rent was a proper revenue charge. But, the contract taking the form it does, it is equally difficult to put out of view the fact that the consideration is not a rent but a capital price. The contract might easily have assumed either form, and would have suited the respondent equally well either way. E

Thus, in the case before me, the question whether substance should be preferred to form or form to substance has emerged during the argument. The Solicitor-General argued that the substance should govern the decision. Mr. Latter's argument on behalf of the board was, as I understand it, this: "You can only look at the legal obligations of the parties under the document in the case, whatever it may be." He cited the decision of the House of Lords in *Inland Revenue Comrs. v. Westminster (Duke)* (2) in support of that view. I think that Mr. Latter's contention is well-founded. It is said, and truly said, that whether a payment is a revenue payment or a capital payment may depend upon the angle from which you look at it. The payment may be a revenue payment from the point of view of the payer and a capital payment from the point of view of the receiver, and, *vice versa*, it may be G

a revenue payment from the point of view of the receiver and a capital payment from the point of view of the payer. The fact that the sum payable by the board is a sum which, over a period of years, will recoup to the Racecourse Co. nearly the whole of the cost of the erection of the buildings, and at the same time give a reasonable return on the money that they have invested, is, I think, immaterial. The question is whether or not under this document you can spell out any obligation on the part of the board to make a capital payment to the Racecourse Co. I think that, it is clear, as I have said, not only from the declaration, but also from the method in which the annual payment is calculated—namely, 12½ per cent. on cost—that the payment is of such an amount as to recoup to the Racecourse Co. their expenditure on the buildings. However, I do not think that that is a matter which touches the issue to be determined here.

In my view, the annual sum paid by the board must be treated, for the purpose of ascertaining their liability to income tax, as a revenue payment. It is not necessary for me to review all the cases which have been cited, but with regard to *Boyce v. Whitwick Colliery Co., Ltd.* (3) I may point out that all the members of the Court of Appeal considered that the question whether the payments prescribed by the agreement which was under consideration in that case were to be attributed to capital or to revenue depended on the true construction of the agreement. In my view, that case, as well as *Inland Revenue Comrs. v. Adam* (1), supports the argument for the board put forward by Mr. Latter. I think, therefore, that this appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Simmons & Simmons* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

ANDERSON (SIR ALAN GARRETT) v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), November 11, 1938.]

Revenue—Stamp duty—Voluntary disposition—Voluntary transfer of mortgage—Mortgage sufficiently secured—Finance (1909-10) Act, 1910 (c. 8), s. 74 (1).

A voluntary transfer of a mortgage upon which the sum of £4,937 17s. was outstanding, together with current interest amounting to £95 9s. 1d., making a total sum secured of £5,033 6s. 1d., was assessed to stamp duty at *ad valorem* conveyance duty upon the sum of £5,033 6s. 1d., the value of the property transferred. It was admitted that the mortgage was well secured:—

HELD: the assessment was correct. The deed was liable to *ad valorem* duty as a voluntary disposition *inter vivos*, and not as a transfer of a mortgage.

[EDITORIAL NOTE. The assessment of stamp duty here considered has been a matter of contention for some little time, and the present decision places the question of the amount of stamp duty upon such a document beyond dispute. It must be noted, however, that it was admitted that the mortgaged property was sufficient security for the mortgage debt. The case was treated as a test case, the Crown undertaking to pay the appellant's costs as between solicitor and client in any event.

AS TO STAMP DUTY ON TRANSFER OF MORTGAGE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 341, 342, para. 509; and FOR CASES, see DIGEST, Vol. 35, p. 385, Nos. 1277, 1278.]

Case referred to:

- (1) *Speyer Brothers v. Inland Revenue Comrs.* (1902), 66 J.P. 551; 39 Digest 290, 709. B

APPEAL by way of special case stated under the Stamp Act, 1891, against a decision of the Inland Revenue Commissioners as to the stamp duty payable upon a voluntary transfer of mortgage.

Michael E. Rowe for the appellant. C

J. H. Stamp for the respondents.

MACNAGHTEN, J.: By the Stamp Act, 1891, mortgages are subject to an *ad valorem* stamp duty of 2s. 6d. per cent., and transfers of mortgages are subject to an *ad valorem* stamp duty of 6d. per cent. Therefore, under the Stamp Act, 1891, the duty payable upon this deed would be a duty of 6d. per cent. calculated on the amount of the principal and interest transferred by the appellant. The Finance (1909-10) Act, 1910, made various changes in the stamp duties. By sect. 73 it provided that the stamp duties on conveyance or transfer on sale of any property which by the Stamp Act were at the rate of 10s. per cent. should be doubled, and by sect. 74 (1) it provided that:

Any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale. . . . F

Under the schedule of the Stamp Act, the *ad valorem* duty on a conveyance or transfer is calculated upon the amount or value of the consideration for the sale. Obviously, a different method of calculating the amount of the duty was necessary when it was made payable in the case of a voluntary disposition. G

The question at issue on this appeal is whether this transfer by Sir Alan Garrett Anderson is liable to pay the old duty of 6d. as on the transfer of a mortgage, or whether it is liable to the duty of £1 per cent. chargeable on conveyances on sale. What the object of the legislature was in enacting the Finance (1909-10) Act, 1910, s. 74, does not seem to me to be a material question. The question here is as to the meaning of the words that have been used. I think that they are quite plain. This deed is a transfer. Of that there can be no doubt. It operates as a voluntary disposition *inter vivos*. Therefore, it plainly H

comes within the provisions of the section. Mr. Rowe, for the appellant, says that it seems very odd that the transfer of a mortgage for consideration should pay no more than 6*d.* per cent. and that a transfer by way of gift should pay £1 per cent. and he says that Parliament cannot have intended such a whimsical result. I am not sure that that is so strange as Mr. Rowe suggests. Down to 1910, voluntary conveyances had been exempt from the *ad valorem* duty imposed by the Stamp Act, 1891, and it may be that the legislation with regard to death duties, beginning with the Finance Act, 1894, had given so much encouragement to the voluntary dispositions of property that Parliament considered it advisable to make stamp duties on voluntary conveyances *inter vivos* chargeable with an *ad valorem* duty. However that may be, the words of sect. 74 are plain. This deed has got to be charged with the like stamp duty as if it were a conveyance or transfer on sale. All that it is necessary to do is to turn to the Stamp Act, 1891, to see what is the duty on a conveyance or transfer on sale. The duty imposed by that Act, as amended by later Acts, is the duty that must be paid. Mr. Rowe argues that in the schedule of the Stamp Act, 1891, special provision is made for the very instrument that is now under consideration—namely, the transfer of a mortgage—but I think that the argument of Mr. Stamp is right—namely, that the deed being chargeable with 6*d.* duty under the Stamp Act and with £1 duty under the Finance (1909-10) Act, 1910, the Crown is at liberty to charge the higher duty: *Speyer Brothers v. Inland Revenue Comrs.* (1). My opinion, therefore, is that this appeal fails.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by W. J. ALDERMAN, ESQ.; Barrister-at-Law.*]

HARRODS, LTD. v. GENEEN.

[COURT OF APPEAL (Slessor, MacKinnon and Finlay, L.JJ.), **November 23, 1938.**]

Agency—Commission—House agent—Contract to find tenant willing to pay rent in advance—Tenant found only willing to pay rent in arrear—Tenant at first accepted by landlord but finally rejected—Whether original contract varied—Right of agent to commission.

The defendant commissioned the plaintiffs to find a tenant for some premises who would be willing to pay the rent in advance. A tenant was proposed, who, though otherwise suitable, was only willing to pay the rent in arrear. After negotiations, this tenant was accepted by the defendant, but he then changed his mind and refused to accept her. On an action being brought by the plaintiffs to recover damages for being prevented from earning their commission, it was contended by the defendant that there had been no consideration by the plaintiffs for any variation of the contract:—

HELD (MACKINNON, L.J., dissenting): when once the defendant had agreed to accept the proposed tenant, the rent to be payable in

arrear, the plaintiffs had fulfilled their promise, and were entitled to their commission. The mutual promises were the consideration for the variation of the contract.

[EDITORIAL NOTE.] The Court of Appeal have here differed upon the question whether there was any consideration for the variation of the agreement. The view taken by the majority is that the agreement as varied is supported by the consideration of the mutual promises, one side promising to treat the original contract as fulfilled upon the introduction of a tenant willing to accept the tenancy upon new terms, and the other promising to introduce such a tenant. In effect, therefore, it is immaterial that a tenant, such as must be accepted under the agreement as varied, had been found by the agents while they were still employed under the original agreement, under which such tenant need not be accepted.

AS TO SUFFICIENCY OF ACTS TO EARN COMMISSION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 258, 259, para. 433; and FOR CASES, see DIGEST, Vol. 1, pp. 493-502, Nos. 1693-1721.]

Cases referred to :

(1) *Prickett v. Badger* (1856), 1 C.B.N.S. 296; 1 Digest 509, 1754; 26 L.J.C.P. 33.

(2) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436; Digest Supp.; 103 L.J.K.B. 634; 152 L.T. 88.

APPEAL from a decision of MACNAGHTEN, J., dated Mar. 1, 1938. The facts of the case are fully set out in the judgments.

P. E. Sandlands, K.C., and *A. E. Beecroft* for the appellants.

H. C. Leon for the respondent.

SLESSER, L.J. : This is a difficult case, and the difficulty is shown by the fact that the court is not unanimous in its views. It is a claim for damages by an estate agent, on the ground that he has been wrongfully prevented from earning his commission.

The facts of the case, so far as they are here material, are these. On July 7, 1936, Mr. Williams, who apparently is also sometimes known under the name of Mr. Mantell, representing the plaintiffs, Harrods, Ltd., visited the defendant at his offices and received instructions from him to find a lessee of his property, 47 and 49, Brompton Road, at a rental of £1,500 per annum, the tenant to pay rates and taxes, with certain provisions as to purchasing the fixtures and showcases at a valuation. That employment was confirmed in writing by a letter from the plaintiffs to the defendant, dated July 7, 1936, which is in the following terms :

With reference to our representative's call upon you, we confirm instructions in regard to the disposal of the above premises as follows : Lease about 14 years to run; rent £1,500 per annum plus rates. Fixtures and fittings, showcases, etc., to be taken at a valuation.

So far, the case presented no difficulty. There was no disagreement between the parties. However, it was very early made quite clear that the employer, who wished to dispose of the premises, was insistent that the rent should be paid in advance, both for the first quarter and thereafter, and that he was not content to be proffered a tenant who was not prepared so to pay the rent in advance.

The plaintiffs did succeed in interesting a prospective tenant, Mrs. Pauline Cohen, who was willing, subject to certain adjustments about fixtures which are now not material, to enter into an agreement on the terms proposed, subject to this, that she was only prepared to pay the rent in arrear—that is, at the end of each quarter. By a series of most
A unfortunate misunderstandings, the written documents which passed between the solicitors and the parties failed to express the intentions of the parties. For my part, I do not think it necessary in this case to enter into those particular misunderstandings. They really have nothing to do with the case which we have to consider. The fact is that, up
B to the date of a certain interview between Mr. Geneen, who was the vendor of these premises, and Mr. John Williams, or Mantell, as he is called, there is no question but that Mr. Geneen was insisting upon being paid his rent in advance. There is equally no question but that Mrs. Cohen, who was the only tenant who was under consideration, was pre-
C pared to agree only if she was allowed to pay the rent in arrear.

That brings one to the critical interview in the case, which really provides the problem which has to be considered. It was on Dec. 17, 1936. There was evidence before the judge both by Mr. John Williams on behalf of the company and by the defendant, and in substance I think
D that their evidence is in agreement. Mr. John Williams says this :

On Dec. 17, Mr. Geneen called on me. He did not mention anything about fixtures and fittings, but the whole point of the conversation was in regard to rent in advance or in arrear. I had previously explained that the terms were rent in advance. They were the terms he had agreed to go on, and I had arranged for the terms to be in advance in my correspondence with the agents who were in
E touch with the proposing tenant. He discussed the advisability of taking her as a tenant. He did not want to lose a good opportunity of letting, and asked me what I thought about it, and if I would go on with it if I were him. I explained to him that the references seemed quite satisfactory to me, and I thought they would be to him, and I did not see why he should not go on with it. I could not tell him to go on with it, but I suggested he should, and after about ten minutes' conversation he said : " All right, I will." He picked up the telephone and rang up the solicitors to tell them to proceed with the engrossment of the lease.

That is Mr. John Williams' story of what happened. Mr. Geneen says
F this. On Dec. 17, he had an interview with Mr. Williams :

At the interview with Mr. Mantell [as he calls him, but it is the same man], he assured me that it was the offer of a responsible person, who had so many shops, and we need not be afraid she would not pay in any way. I said then : " I cannot
G see why she should not pay in advance, if she has so many shops." He said : " You do not want the deal to fail to go through over such a trifling amount." . . .

I think that the word " amount " there must be a misunderstanding. It clearly means " such a trifling question."

H . . . and I said, " Very well," and rang up the solicitor.

The facts are, therefore, clear. By Dec. 17, Mr. Geneen had refused to consider any tenant who would not pay in advance, and, in my view, Messrs. Harrods had failed up to that time to produce any tenant within the scope of the business for which they were employed, because the only tenant they did produce, Mrs. Cohen, did not satisfy the conditions

on which they were entitled to earn their commission, because she was a tenant who was only prepared to pay in arrear. On that date, however, the employment was altered. It may not be quite accurate to call it, as the judge does, a second employment. It may be that the right view is—and I am inclined, after hearing the evidence, to think that it is—that it is a new contract produced by a variation of the original contract. A To my mind, that does not affect the question which we have here to consider.

The question is whether for that variation there was any consideration justifying the plaintiffs in saying that they had been prevented from earning their commission—that is to say, first justifying a new contractual relationship between the parties, and, from that, a claim for damages arising out of that contractual opportunity which they so acquired. In my opinion, there was such a consideration, and the consideration was this. Until Dec. 17, albeit Harrods had nominally mentioned a lady called Mrs. Cohen, that lady was not, and could not be, a tenant within the meaning of the contract. It was only after the contract had been varied, and after Mr. Geneen had agreed to accept a tenant who would pay only when the rent was in arrear, that the right to say that they had satisfied the conditions of their employment arose. That cannot have happened until Mr. Geneen had agreed to that variation of their employment. It follows, therefore, that, the moment he had agreed to that variation, for the first time they were able to produce a tenant who satisfied the requirements of that condition—that is, a tenant who would pay in arrear. B C D

For myself, I see no difference in principle between this case and the case where I think Mr. Leon was constrained to admit that they would have been entitled to have their commission—namely, if Mrs. Cohen, or any other person who was willing to pay in arrear, had been produced for the first time after the variation of the agreement of Dec. 17. The mere fact that Mrs. Cohen had been discussed before that time seems to me to be beside the point because she was no more relevant to the discussion under this contract than was anybody else until such time as either she agreed to pay in advance or Mr. Geneen agreed to have the contract varied so as to make her acceptable if she paid in arrear. E F

Mr. Leon has taken another point. He has said that the general principles which are associated with *Prickett v. Badger* (1) do not apply here, because of a qualification which has been put upon the right of the agent to claim damages which found expression, for example, in the judgment of GREER, L.J., in *Trollope (George) & Sons v. Martyn Bros.* (2), where he says, at p. 452, that there must be a stipulation : G H

... in favour of the agent that when the agent had done all that he had contracted to do, the principal would not by withdrawing, without reasonable cause, so far as the agent was concerned, from the transaction, deprive the agent of the commission which would become due if the sale with his customer had been completed.

He points out that MAUGHAM, L.J., as he then was, clearly qualifies the

right of the agent to recover damages. Whatever may be the exact content of those words, I am of opinion that, in the present case, they cannot possibly be applied to defeat the claim of the agent to his damages. The fact is that the only thing which could be said here to constitute a reasonable cause was that Mr. Geneen, within a week of agreeing to

A accept this lady, had changed his mind, and said he would take her only if she did pay the rent in advance. The refusing to go on which constitutes the basis of the plaintiffs' claim to damages in this case was said to have been founded—in part, at any rate—upon the fact that certain references which had been given by the sub-agent as to the
B solvency and desirability of Mrs. Pauline Cohen as a tenant proved to be false. However that may be, it is a matter for which, in my view, Messrs. Harrods were not responsible. Mr. Leon, being asked by the judge, admitted that. MACNAGHTEN, J., during the examination of Mrs. Cohen, said :

C I understood Mr. Leon to say he did not dispute that she was able to pay this rent. Is that right, Mr. Leon ?

Mr. Leon answered :

I never actually put it that way, but your Lordship has gathered exactly what I meant.

D Then MACNAGHTEN, J., said :

You do not dispute that she was able to pay the rent, but she was unwilling to pay it in advance. The point certainly seems to lie in the very narrowest compass.

On that, it seems to have been admitted that, whether the references were good or bad, the lady could pay the rent. If she could pay the rent, whatever may be the reasonable causes which might have moved
E Mr. Geneen not to go on with this agreement, as the sole question at issue is whether she should pay in advance or pay in arrear, I find it impossible to say that the qualification laid down by GREER, L.J., existed in this case. I think, therefore, that this is a case which falls
F within the general principle of *Prickett v. Badger* (1), and, therefore, that this appeal should be allowed.

MACKINNON, L.J. : This case might be one of the cases provided by those in authority for the consideration of law students at a moot. There are no facts in dispute. It raises pure questions of law, and,
G as I think, elementary questions of law.

In July, 1936, Mr. Geneen made a contract with the plaintiff company. Putting it quite shortly, that contract was this : if you will find a tenant who will pay £1,500 per annum payable in advance, I will pay you £150. That was a contract for which the respective considerations
H were mutual promises. If Harrods did that which they undertook to do, Mr. Geneen would come under a legal obligation to pay them £150. If, they having done all that they agreed to do, or that he had required them to do, he had refused to go on with the matter, and thereby deprived them of the benefit of the contract, he would come under a legal obligation to pay them damages. They did find a tenant whom they thought

was exactly within the terms of the mandate given to them. That is recorded in a letter of Nov. 11, written by the plaintiff company :

With reference to your telephonic call yesterday, we understand you are agreeable to accept Mrs. Cohen [previously described as "Mrs. Pauline Cohen"] as tenant of the above premises on the terms of our letter of yesterday's date, and have since received her acceptance of the other points raised by you, which include the rent in advance.

I need not read the rest of it. It thus appeared that the contract had been fulfilled by Harrods, and either Mr. Geneen would have been bound to go on and complete with Mrs. Cohen, and pay them their commission, or he could have refused to go on and complete with Mrs. Cohen, and then he would have been liable for damages for preventing them from earning their £150 under the contract.

The difficulty arose because it appeared that Mrs. Cohen was not, as they had thought, willing to pay the rent in advance, but was willing only to pay the rent in arrear. There was, therefore, a deadlock. That deadlock resulted in an interview between Mr. Geneen and the representative of Harrods on Dec. 10. The representative of Harrods said : " Well, it is a small matter. Do you not think you had better accept her on those other terms ? " Eventually Mr. Geneen said in effect : " Very well, I will accept her as tenant, even though she will only pay in arrear." Later on, he changed his mind. He did so because he heard some matters with regard to the possible solvency of Mrs. Cohen. MACNAGHTEN, J., who went into the matter, thought, on considering it, that he had excellent reasons for changing his mind, but it seems to me quite irrelevant. In fact, he changed his mind.

Those being the circumstances, the question is whether the plaintiffs can claim £150 as damages from Mr. Geneen because he refused to go on with Mrs. Cohen and accept her as a tenant paying rent in arrear, and not in advance. It is quite clear that the original contract was not performed. Something else has happened, or has been done. There was some talk in the argument—it appears to be echoed in the judgment of MACNAGHTEN, J.—of there having been a new employment. I do not think that there can be any question of a new employment. A new employment of this nature would be : " If you will find a tenant who will pay £1,500 in arrear, I will pay you £150." The consideration for that would be Harrods doing the work and finding such a tenant. There was no such contract. They never did any such work. Mrs. Cohen had been found, and had been introduced, and negotiations were going on with her. The only ground on which this claim can be put—and must be put, as I think—is that there was a variation of the original contract which binds the defendant, a variation in the sense that, in place of the terms " payable in advance " in the original contract, the words " payable in arrear " are substituted. There is no question of any new employment to do work in future, because all the work and all the employment had been finished in the past.

Was there a variation of the contract which made Mr. Geneen liable

contractually for the contract in those varied terms? The variation of a contract, like the creation of an original contract, must be supported by some consideration to make the party bound to that variation. If it be asserted, as is obviously the fact, that on Dec. 10 Mr. Geneen said:

A “I will accept Mrs. Cohen as a tenant, and treat you as having fulfilled your original contract,” the question is whether or not there was any consideration for that promise. In my view there was no consideration. There was nothing to be done by Harrods. Everything under such a contract that they were to do, or ought to have done, had already been done. It is true that he did so promise. That, however, was a promise

B to the agents, and to the agents only. Was it a promise to the agents which he was bound to fulfil? I think not. It was a promise that was a *nudum pactum*, and he could break it, as he did, without being liable in damages for so doing.

Mr. Sandlands asked the question in argument: Supposing he had

C gone and completed the lease with Mrs. Cohen on the terms of paying in arrear, and not in advance, can there be any doubt that Mr. Geneen would have been liable to pay Harrods their commission? I agree that there could be no doubt. Then, however, he would have been accepting the benefit of what they had done, and he would have been

D treating them as having fulfilled their contract. Then, in that case, he would have to pay what he had promised, £150. The question is, however, whether or not, when he made to them the promise “I will accept Mrs. Cohen as tenant,” that was a promise which was clothed with an obligation of performance, or a liability to pay damages if it

E were broken. I think that it was not, and for that reason I think that the judgment of MACNAGHTEN, J., was right, and that the appeal should be dismissed.

FINLAY, L.J.: I agree with SLESSER, L.J., in thinking that the

F appeal ought to be allowed. I agree with MACKINNON, L.J., that this case raises an interesting point, no less interesting because it depends, as I think it does, upon the solution of rather elementary questions of law. It is quite unnecessary that I should repeat the facts. They have been quite sufficiently stated by both my brethren.

G The ground upon which I think that the appeal falls to be allowed I can state, I hope, quite shortly. For myself, I think that it really does not matter whether one speaks of a new contract, or of a new employment, or of a variation of the contract. Where a contract is varied, then, in a very real sense of the word “contract,” a contract different

H from that which subsisted before is entered into between the parties. My view of what happened here is this. I think that Messrs. Harrods said to Mr. Geneen: “Will you agree that we fulfil our contract if we produce to you a tenant who will fulfil the other conditions, but who will in fact only pay the rent in arrear?” Mr. Geneen, I think, said: “Very well, I will agree to it.” There I think a contract was made,

and the consideration was the mutual promises. On that, Messrs. Harrods did produce a person, Mrs. Cohen. For myself, I do not think it is material that Mrs. Cohen had been found at an earlier stage of the business, when the contract was a different contract. Messrs. Harrods, when the mutual promises had been made, then and there had Mrs. Cohen ready as a person who fulfilled the necessary conditions. It does not seem to me to matter that they did very little or even nothing. They did produce the person. It is not necessary that an estate agent should have to go to enormous labour to earn his commission. One may go to an estate agent and say: "Find me a tenant or a purchaser," and the estate agent may, without the slightest trouble, have a person at hand—it may be, actually in his office—who is willing and anxious to take that very house. That does not matter. The essential thing is that you should have the mutual promises, and then that you should have the fulfilment, so to speak, of the bargain by the producing of the person. The whole thing, as I think, is summed up in a single answer, the very last answer in the transcript, given by Mr. Geneen—Mr. Sandlands called our attention to it—when he was being cross-examined. This question was put to him :

At that time, as far as Harrods were concerned, they had found a tenant whom you accepted ?—Yes.

As I follow the very able argument of Mr. Leon, he completely accepted the position that, the events being exactly as they were, except that Mrs. Cohen had not been produced to Mr. Geneen, though known to Messrs. Harrods before, and then that Mrs. Cohen had been produced, they would have earned their commission.

I think that the position cannot really be altered by the circumstance that, in another light, as it was expressed, or in another capacity, as it was also expressed, Mrs. Cohen had been known before, and known not only to Messrs. Harrods but also to Mr. Geneen. When the new contract, as I think it was, was made, then, and then only, was Mrs. Cohen produced, and produced as a person who fulfilled the conditions. Then, as it seems to me, Messrs. Harrods became entitled to their commission. On those grounds, which agree, I think, in substance, though less well expressed, with the view stated by SLESSER, L.J., I agree with him in thinking that the appeal ought to be allowed.

Appeal allowed with costs. Leave to appeal.

Solicitors : McKenna & Co. (for the appellants) ; Arthur Hunt (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

SHENTON v. TYLER.

[CHANCERY DIVISION (Simonds, J.), **November 22, 1938.**]

*Discovery—Interrogatories—Privilege—Communications between spouses—
Privilege claimed by widow in respect of communication during the marriage
—Evidence Amendment Act, 1853 (c. 83), s. 3.*

A The plaintiff sought to administer certain interrogatories to the defendant in order to establish that the defendant's late husband had created a secret trust in her, the plaintiff's, favour. Owing to these interrogatories being based on communications between the defendant and her late husband during their married life, the defendant contended that she was privileged from answering the interrogatories so administered.

B On behalf of the plaintiff, it was argued that, as the defendant was now a widow, she could no longer claim the privilege, and that the Evidence Amendment Act, 1853, s. 3, had modified the old common law rule according to which a wife was neither a compellable nor an admissible witness in respect of communications made to her by her husband during their married life:—

C **HELD :** (i) as communications made between husband and wife during their married life were privileged, the fact that the husband was now dead did not alter the position, and the widow was excused from disclosing such communications.

(ii) the Evidence Amendment Act, 1853, s. 3, did not in any way modify that rule.

[EDITORIAL NOTE.] It was here contended that the Evidence Amendment Act, 1853, s. 3, made admissible the evidence of a widow as to communications between herself and her late husband. This contention is rejected. Such communications are, therefore, privileged from disclosure by way of interrogatories.

AS TO PRIVILEGE IN RELATION TO INTERROGATORIES, see HALSBURY, Hailsham Edn., Vol. 10, p. 412, para. 496; and FOR CASES, see DIGEST, Vol. 22, p. 420, Nos. 4307-4311. See also YEARLY SUPREME COURT PRACTICE, 1939, p. 481.]

E Cases referred to:

- (1) *Monroe v. Twisleton* (1802), Peake, Add. Cas. 219; 22 Digest 420, 4307.
- (2) *Doker v. Hasler* (1824), Ry. & M. 198; 22 Digest 420, 4308; *subsequent proceedings* (1825), 2 Bing. 479.
- (3) *O'Connor v. Marjoribanks* (1842), 4 Man. & G. 435; 22 Digest 420, 4309; 11 L.J.C.P. 267; *subsequent proceedings* (1843), 12 L.J.C.P. 161.

F **PROCEDURE SUMMONS** for leave to administer certain interrogatories, details of which are fully set out in the judgment.

Roger Turnbull for the plaintiff.

G. D. Johnston for the defendant.

G **SIMONDS, J. :** In this case, a somewhat curious point arises under a procedure summons. The plaintiff claims that during his life a certain testator, now dead, communicated to his wife, the defendant in these proceedings, his wish that she should pay to the plaintiff during the plaintiff's life out of the estate of the testator a certain weekly sum, and

H she claims that the defendant promised the testator to pay that weekly sum, and, on the faith of that promise, the testator allowed the defendant to become entitled under his will to his residuary estate. She pleads that she is unable to give particulars of that promise until discovery.

The defendant by her defence wholly denies that any such wish was expressed or promise made. Upon that, issue is joined, and the plaintiff

seeks to establish her case by interrogating the defendant. The interrogatories which she seeks to administer are these :

1. Did not your late husband communicate to you during his lifetime his wish that you should during the lifetime of the plaintiff pay to her or to some other and what person for her own use the weekly sum of £2 or some other and what weekly sum ?

2. If yea, what was the date of such communication ?

3. Did you not promise your late husband that you would during the lifetime of the plaintiff pay to her or to some other and what person for her use the weekly sum of £2 or some other and what weekly sum ?

4. If yea, what was the date of such promise ?

Those interrogatories are objected to by the defendant on the ground—and this is the only ground which has been contested before me—that she stood in the relation of wife to the testator, and that any communication made to him by her, or by him to her, is protected by the old common law rule regarding the inviolability of any confidence between husband and wife, a rule which no doubt went back for many centuries.

I have been referred to a number of cases, the first of which was *Monroe v. Twisleton* (1), a decision of LORD ALVANLEY in 1802. The sidenote is this :

Where man and wife are divorced by Act of Parliament, the wife is not competent to prove a contract made by her husband previous to the divorce.

The only question here was in what respect her evidence was limited or qualified by that. She had been, though she no longer was, his wife, and what LORD ALVANLEY said was, at pp. 220, 221 :

To prove any fact arising after the divorce this lady is a competent witness, but not to prove a contract or anything else which happened during the coverture. She was at that time bound to secrecy ; what she did might be in consequence of the trust and confidence reposed in her by her husband ; and miserable indeed would the condition of a husband be, if, when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, entrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice.

That principle of the common law, so stated by him, was approved by BEST, C.J., as he then was, in *Doker v. Hasler* (2), and was again approved in *O'Connor v. Marjoribanks* (3), where, after a consideration of earlier cases, including those two to which I have referred, TINDAL, C.J., said, at pp. 442, 443 :

. . . it appears to me that, of the two [other cases], *Monroe v. Twisleton* (1) is the sounder ; and that the doctrine therein laid down is built upon the general rule of law, which, subject to certain well-known exceptions, is this ; that a wife never can be admitted as a witness either for or against her husband ; she cannot be a witness for him, because her interest is precisely identical with his ; nor against him, upon grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury. There are cases to show that this intimate relation subsisting between the parties is not to be considered as dissolved by death, so as to let in the evidence of either party as to transactions occurring during their joint lives ; but we are asked to confine the rule to cases where the communications between the husband and wife are of a confidential nature. But such a limitation of the rule would very often be extremely difficult of application ; and would introduce a separate issue in each cause as to whether or not the communications between husband and wife were to be considered of a confidential character. Upon the whole, I think it better to adopt LORD ALVANLEY'S rule in *Monroe v. Twisleton* (1). . . .

That opinion was concurred in by COLTMAN and MAULE, JJ., so that

the rule at common law appears to be absolute that no communication between husband and wife during the marriage state is to be divulged, and that neither party is compellable by interrogatory or otherwise to give evidence upon matters which have been so divulged by one to the other.

A That being the common law, it has been pressed upon me by Mr. Turnbull, on behalf of the plaintiff, that the general rule of the common law is to be regarded as in some way qualified or limited by the provisions of the Evidence Amendment Act, 1853, s. 3, which runs as follows:

B No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

The argument is that that is a complete code of the law in regard to the matters passing between a husband or a wife which one or the other of them may be compelled to disclose. The comment I must make upon
C that argument is this. It must be read in conjunction with the two earlier sections of the Act, and it appears to me, as read, to amount to no more than that, whereas the Act has by sects. 1 and 2 provided that, where husband and wife are parties, they are to be admissible witnesses except, as provided by sect. 2, in criminal cases, yet, though they are
D admissible witnesses, that to which they may give evidence is to be limited as it is limited by the general rule of law. Sect. 3 is not a section which deals at all with the case of a widow—a widow always was an admissible witness, as was a divorced woman—but deals with whether a widow or a divorced woman is a witness as to matters which passed
E between her and her husband. In this case, I have to deal with the case of a widow, and I find nothing in this section of this Act which in any way limits the rule of common law that a widow was not compellable or admissible as a witness in respect to things which passed between her and her husband during their marriage. It has again been pressed upon
F me that the result in this particular case may be that the widow, by pleading this rule of privilege of the law, may in fact be enabled for her own benefit to betray the confidence put in her by her husband. That may be, but it is not possible, in my judgment, to make a breach in the general rule of the common law because in a particular case it may mean
G an injustice. Accordingly, I must uphold the objection which has been made to these interrogatories, and refuse the plaintiff's application. As I think this goes to the very heart of the matter, I must make the costs the defendant's costs in any event.

H *Plaintiff's application to administer interrogatories refused. Costs to be defendant's in any event.*

Solicitors : *John B. Borer*, agent for *Loseby, Son & Hammond*, Leicester (for the plaintiff) ; *Robinson & Bradley*, agents for *Evan Barlow, Son & Fordham*, Leicester (for the defendant).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

BRITISH INDUSTRIAL PLASTICS, LTD. v. FERGUSON.

[COURT OF APPEAL (Slessor, MacKinnon and Finlay, L.JJ.), November 11, 14, 15, 24, 1938.]

Master and Servant—Secret process—Leaving agreement—Disclosure to patent agent—Patentability—Inducement of breach of agreement—Justification—Conspiracy. A*Tort—Inducing party to break contract—Bona fide acts—Whether special damage must be proved.*

The defendant D. had been employed by the plaintiffs for many years. In 1932, he left their employ, and thereafter entered into a leaving agreement with them whereby he undertook, *inter alia*, until Mar. 31, 1934, not to interest himself directly or indirectly in the manufacture or sale of certain chemicals which were used in a secret process of the plaintiffs. [In June, 1934, D. approached the defendant company and suggested that he had a process of his own that might be of use to them. They sent him to their patent agents, who, after investigation, reported that the process was patentable, and in due course application was made for a patent.] The plaintiffs commenced an action against D., the defendant company and F., its managing director. The claim against D. was for damages for breach of contract, that against the defendant company and F. was for damages for inducing the breach, and that against all the defendants was for damages for conspiracy. It was found that the defendant company had acted honestly, but in a muddle-headed way, and that, though, when the defendant D. first approached them, they suspected that his process might have been secret and the plaintiffs' property, they were under the impression that, if this process were patentable, it could not be secret:—

HELD: (i) ^Aas the defendant company had acted *bona fide*, they could not be said to have acted wilfully or knowingly so as to procure a breach of the defendant D.'s contract.

(ii) (*per* SLESSOR, L.J.) in the alternative, if the defendant company had procured the publication of the secret process to their patent agents, they had had lawful justification in so doing in order to protect themselves. E

(iii) in an action for damages for inducing a breach of contract, it is not necessary to prove special damage. In the present case, had the facts established a cause of action, publication to the patent agents alone would have supported a claim for damages, although no loss to the plaintiffs flowed directly from this act.) F

[EDITORIAL NOTE.] Where a contractual relationship exists between parties, it is a tort for anyone wrongfully to induce one of the parties to break the contract so as to cause damage. There is a right of action whether or not specific damage has accrued. The word "wrongfully" in such a case is here construed to mean knowingly rather than maliciously. It would seem to be sufficient that a party should act *bona fide* in the matter, and he will not be liable to an action by reason of the fact that he has acted mistakenly, so long as it cannot be said that he was wilfully shutting his eyes and excluding a means of knowledge. Thus, where a party suspects that there is a possibility that an act of his will in effect induce a breach of contract, and he adopts means of testing that possibility which he honestly believes to be a proper test, he does not render himself liable to an action because he is mistaken as to the efficacy of that test. G

AS TO INDUCING BREACH OF CONTRACT, see HALSBURY, 1st Edn., Vol. 27, Tort, pp. 475, 476, para. 927; and FOR CASES, see DIGEST, Vol. 42, pp. 986-990, Nos. 167-194.] H

Cases referred to :

- (1) *Sorrell v. Smith*, [1925] A.C. 700 ; 42 Digest 985, 156 ; 94 L.J.Ch. 347 ; 133 L.T. 370.
- (2) *May v. Chapman* (1847), 16 M. & W. 355 ; 6 Digest 142, 930 ; 8 L.T.O.S. 369.
- (3) *Quinn v. Leathem*, [1901] A.C. 495 ; 42 Digest 971, 30 ; 70 L.J.P.C. 76 ; 85 L.T. 289.
- (4) *Lumley v. Gye* (1853), 2 E. & B. 216 ; 42 Digest 987, 169 ; 22 L.J.Q.B. 463.
- (5) *Bowen v. Hall* (1881), 6 Q.B.D. 333 ; 42 Digest 988, 174 ; 50 L.J.Q.B. 305 ; 44 L.T. 75.
- (6) *Allen v. Flood*, [1898] A.C. 1 ; 42 Digest 972, 35 ; 67 L.J.Q.B. 119 ; 77 L.T. 717 ; *revsq.* S.C. *sub nom.* *Flood v. Jackson*, [1895] 2 Q.B. 21.
- (7) *Jones v. Gordon* (1877), 2 App. Cas. 616 ; 6 Digest 140, 922 ; 47 L.J. Bey. 1 ; 37 L.T. 477 ; *affg.* S.C. *sub nom.* *Re Gomersall* (1875), 1 Ch.D. 137.
- (8) *Mogul S.S. Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 ; 42 Digest 968, 6 ; 58 L.J.Q.B. 465 ; 61 L.T. 820.
- (9) *Brimelow v. Casson*, [1924] 1 Ch. 302 ; 43 Digest 115, 1194 ; 93 L.J.Ch. 256 ; 130 L.T. 725.
- (10) *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q.B. 147 ; 42 Digest 988, 178 ; 65 L.J.Q.B. 262 ; 74 L.T. 83.
- (11) *Goldsohl v. Goldman*, [1914] 2 Ch. 603 ; 42 Digest 988, 179 ; 84 L.J.Ch. 63 ; 112 L.T. 21 ; *on appeal*, [1915] 1 Ch. 292.

D **APPEAL** from a decision of PORTER, J., dated Feb. 14, 1938. The facts of the case are fully set out in the judgments.

K. E. Shelley, K.C., and *Guy T. Aldous* for the appellants.

Sir Patrick Hastings, K.C., and *James Mould* for the respondents.

E *Shelley, K.C.* : In this art, there were very few people who knew anything about this type of process. A secret process means one that is not public knowledge. Public knowledge is such knowledge as is known to, or could be found out by, members of the public. If a process is founded on a piece of knowledge not available to the public, it is a secret process. The judge failed to bear in mind that, if a thing is patentable, it must be new, and therefore it must be secret up till then. When the **F** specification is published, however, its contents become public knowledge. The judge thought that, because Doherty's information was patentable, it was therefore public. When once the complete specification was published, the damage was done, although all rights under the patent were later withdrawn. A man must be deemed to intend the **G** reasonable and probable consequences of his acts. If a man is put into a position of suspicion, he will not escape the consequences by allowing his suspicions to be allayed : *Jones v. Gordon* (7). It was found as a fact here that this was the plaintiffs' process, that it was secret, and that the defendants suspected that the process belonged to the plaintiffs **H** and was secret. Once Ferguson was put into a position where he was suspicious, and so ought to take reasonable steps to allay such suspicions, if he did not then take such steps, although he was honest, he was still liable. [Counsel referred to *Allen v. Flood* (6) and *Quinn v. Leathem* (3).]

Hastings, K.C. : The only issue here is whether or not Ferguson was honest.

SLESSER, L.J. : The questions were of inducement and conspiracy. They do not depend on one man's honesty. Malice and honesty are irrelevant : *per* LORD WATSON in *Allen v. Flood* (6).

Hastings, K.C. : There is no divergence between the two views. This was a peculiar case. There was no contract between the plaintiffs and Doherty, only an implied term that he would not disclose his masters' secrets. This is like a receiving case. It is a question of guilty knowledge, as in *Jones v. Gordon* (7). The judge found that Ferguson was honest. The onus is on the appellants to prove dishonesty. There was no disclosure until the patent agents had advised that the process was patentable. No damage flowed from the disclosure to the patent agents, and no action lies without proof of special damage. An employer must know that his employee's knowledge is obtained from his previous employers, and may include portions that are secret. Therefore, he must know that there may be secrets in that knowledge, and that is just what the judge has found in this case. There cannot be an inducement of a breach of contract unless a man acts knowingly and intentionally. A man cannot intend that another shall break a contract unless he knows that there is a contract. There is no case in which anyone has been found guilty of inducing a breach of contract where he has had only constructive knowledge of the contract. He must act wilfully and knowingly : *Sorrell v. Smith* (1). [He was stopped by the court.]

Shelley, K.C., in reply.

SLESSER, L.J. : The plaintiffs in this case have for a number of years been very successful in the manufacture and sale of plastic powders which are used for moulding, and out of which domestic and other articles are made, their powder being of the kind called amino-plastic. It is suited to the manufacture of articles of all colours. In the court below, evidence was given of the nature of their manufacture and of the difficulties which they have been compelled to overcome at considerable expense in order to obtain the most satisfactory powder. These matters do not need consideration in the present appeal. It is sufficient to say that the defendant company have also manufactured plastic powder, their powder being of chemical constituents known as the phenolic group. They also, since 1931, have attempted to make amino-plastic powder, but without marked success. They were hampered by a patent which had been purchased by the plaintiffs, but that patent expired in Nov., 1936, and Mr. Ede, the defendant company's chemist, had begun to take steps at the end of 1935 to discover a process which they could use after the patent had expired.

Mr. Doherty, their co-defendant, had joined the plaintiffs many years ago, and since 1916 had been successively their deputy works manager and works manager. In 1932 he left their employment, and on Apr. 8, 1932, he entered into a leaving agreement with the plaintiff company that, among other matters, until Mar. 31, 1934, he would not in any way

interest himself directly or indirectly in the manufacture or sale of certain chemicals which, in substance, included the constituents of the plaintiff company's process.

On June 22, 1934, Mr. Doherty wrote to the defendant company as follows :

A Dear Sirs, I have recently severed my connection as works manager with the British Cyanides Co., Ltd., of which the Beetle Products Co., Ltd., is a subsidiary. During my services with them I was responsible for the whole of the output of Beetle Moulding Powders, also other chemicals manufactured by them. It has occurred to me that my knowledge may be of service to you. If you are interested I should be glad to supply you with any further information you may require. Yours truly, Stephen W. Doherty.

B On June 27, 1934, Doherty met Mr. Ferguson, the managing director of the defendant company, Mr. Welch, a director, and another gentleman at the defendants' works. Doherty, whom Mr. Ferguson states he had never seen or heard of before, brought a copy of the leaving agreement
C which I have quoted; and stated that he had a process for the manufacture of urea formaldehyde moulding powders which was his own, which he was free to use and which he considered to be a good process. He also said that he did not think that it infringed any patents. The judge has found, on consideration of all the evidence, that Mr. Ferguson, and Mr.
D Welch, his co-director, suspected that Doherty's knowledge was, at any rate in the main, derived from his experience at the plaintiffs' works, and that his process might be their process, or some part of it, and secret. As Sir Patrick Hastings has not challenged this finding, I do not think it necessary to consider the evidence which led the judge to this conclusion,
E but will content myself with saying that it seems to me to be the only proper inference to be derived from the facts. On this matter, Mr. Ferguson told the judge that, being frightened by a former experience, in which he had been concerned in litigation regarding the improper acquisition of patent rights, he told Doherty to see the defendants' patent agents, who would look closely into the whole matter and let Ferguson know confidentially whether this was a process that his company was entitled to use as being novel, and whether it was the subject of a patent. He added that, if Doherty could get a patent, the defendant company would be very pleased to consider giving him
F employment. On this, the judge has found that :

G In a muddle-headed way, they—Ferguson and Welch—thought that what their agents considered was patentable by their co-defendant would for that very reason not be secret but open to Doherty's use, and that of his assignees or co-patentees. It did not occur to them that Doherty could be making a false claim, or that he might be revealing his employers' secrets, provided that, before the revelation, they had been assured that he had something which could be the subject of a patent.
H To them, that fact was decisive of the question whether they were obtaining the plaintiffs' secrets or not . . . though they ought to have realised that their fear of the revelation to them of something which the law did not allow them to know ought not to have been allayed by an opinion from their patent agents that the process was patentable.

In fact, the judge found :

. . . that they not only thought that no action would lie if they induced such a revelation, but they also thought that the process, once found to be patentable,

would be proved not to be secret. They knew that the plaintiffs were working under a series of patents, and they thought those patents were their real protection.

He further finds that the defendant company's refusal to have the process disclosed to them was because they were suspicious, and wished to know whether or not their suspicions were justified, and that they referred the matter to their patent agents in the belief—illogical, but actual—that, if those agents found the process patentable, their suspicions would be proved to be unfounded, and the process neither secret nor confidential. The judge negatives the suggestion that the defendants thought that they would avoid detection in patenting the plaintiffs' secrets by the ingenious plan of referring the process to their patent agents for investigation before disclosure. There are other passages in the judgment to the like effect, but the resulting view of the judge is clear—namely, that he thought that, though the defendants acted illogically and in a muddle-headed way in thinking that the patentability of the process would establish their immunity in receiving and working it, they nevertheless acted *bona fide*. A B C

After correspondence between the plaintiff company and the defendants, on Feb. 26, 1937, the plaintiffs issued their writ claiming damages against all the defendants for conspiracy, against the defendant Doherty for breach of agreement, and against the defendant Ferguson and the defendant company for inducing the breach of agreement. They also claimed an injunction to restrain the defendant company from using the secret process or from selling powders manufactured in accordance with it. The judge was of opinion that it was a breach of the implied term of Doherty's contract of service to disclose to the defendant company the plaintiffs' secrets or secret process. He holds that the leaving agreement of Apr., 1932, did not absolve Doherty from his ordinary duty to keep secret the private process of his employers, and he has given damages against him for £15,000. Mr. Doherty has not appealed, and Sir Patrick Hastings, for the respondents, does not dispute, on behalf of the defendant company and Mr. Ferguson, that the judge was right in holding that Mr. Doherty did so break his contract with the plaintiffs. He does, however, contend that the judge was also right in coming to the conclusion, on the findings which I have above stated, that the plaintiff company failed to prove that the defendant company and Mr. Ferguson induced Doherty to break his contract so as to give a right of action against them in tort. D E F G

In order to establish such a course of action, it is necessary, in the first place, for the plaintiffs to show that the act of which complaint is made—that is, the violation of legal right in procuring a breach of contract between two other persons—was wilfully and knowingly done: *per* VISCOUNT CAVE, L.C., in *Sorrell v. Smith* (1), at p. 714. It has been found in this case by the judge, as I have stated, that the defendant company and Mr. Ferguson suspected that Doherty's knowledge of the process might be a knowledge of the process of the plaintiff company, and might H

be secret. If the view of the judge be accepted, as I accept it, that, before they received the information of that process—that is to say, before Doherty broke his contract—they referred him to their patent agents for advice as to whether or not the process was secret, albeit the method they chose to arrive at that conclusion was totally inadequate, yet, if it were done *bona fide*, it does not seem to me that it can be said that they acted wilfully and knowingly either in the sense that they acted with actual knowledge that Doherty would break a contract or in the sense that they refused themselves that means of knowledge by wilfully shutting their eyes: *per* PARKE, B., in *May v. Chapman* (2), at p. 361.

- A Such a view was certainly presented to the court by Mr. Oliver, as he then was, and has been repeated to us by Mr. Shelley, but it has been negatived by the judge. Had the defendant company used proper means purporting to satisfy themselves whether they were acquiring secret information improperly, and if, notwithstanding the suitability of such means, their experts had advised them wrongly, I do not think that it could possibly have been maintained, had they then received the information from Doherty in breach of his contract, that they had wilfully or knowingly procured the breach. The same consideration seems to me to apply in a case like the present, where the means which they used were incompetent, but honestly employed.

- It was argued by Mr. Shelley that, in so far as the defendants did in fact procure Doherty to destroy the secrecy of the plaintiffs by telling him to publish the secret matter to the patent agents, they had illegally induced a breach of contract. I think that this is a wrong construction to put upon their acts. It is true that it was held at the trial that Doherty had broken his contract by disclosing the secrets of the plaintiffs, and it would follow that he first did so when he took the process to the patent agents, but to say that he went there on the suggestion of the defendant company and Ferguson, with a promise of employment if the patent proved valid, is very far from saying that, at the critical moment when they sent him there, they knowingly, intentionally or wilfully—to use the various descriptions of the act which have appeared in the authorities—induced Doherty to break his contract. A breach subsequently disclosed does not produce knowledge on their part by retrospective operation.

- The general principle is that a violation of legal right committed knowingly is a cause of action: *per* LORD MACNAGHTEN in *Quinn v. Leatham* (3), at p. 510. It has been clear ever since the decision in *Lumley v. Gye* (4) that no more is needed to establish the tort than that it shall be knowingly and wilfully procured without just cause or excuse. The earlier view, that its essence was the malicious persuasion to break a contract, as expressed in *Bowen v. Hall* (5), is erroneous. LORD HERSCHELL, in *Allen v. Flood* (6) said, at p. 121:

A study of the case of *Lumley v. Gye* (4) has satisfied me that in that case the majority of the court regarded the circumstance that what the defendant procured

was a breach of contract as the essence of the cause of action. It is true that the word "maliciously" was to be found in the declaration . . . but I do not think the learned judges regarded the allegation as involving the necessity of proving evil motive on the part of the defendant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract.

An act by one of the contracting parties which is procured by either party, but only ascertained subsequently by a breach (in this case it is alleged by one of wilful and fraudulent absence of inquiry into the circumstances when they are known to be such as to invite inquiry amounting to general or implied notice, *per* LORD O'HAGAN in *Jones v. Gordon* (7), at p. 625), is not, in circumstances such as those which the judge has here found, to be taken to be a knowing or wilful procurement of breach of contract. In other words, there being at the time when the secret was disclosed a breach of contract, an actionable procurement could only be assumed by holding either direct knowledge or knowledge to be imputed to the procuring party within the meaning of the authorities which I have cited. Direct knowledge cannot here be found in the evidence, and imputed knowledge to be derived from wilful or fraudulent ignoring of the facts has been expressly negatived by the judge.

On this assumption, the action based upon procurement must fail, but I would add that, in my view, even if it could be said that the suspicions of the respondents amounted to knowledge, there was here, in the circumstances of the case, justification. As LORD MACNAGHTEN said in *Quinn v. Leatham* (3), at p. 510 :

. . . it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

In *Mogul S.S. Co. v. McGregor, Gow & Co.* (8), BOWEN, L.J., in speaking of the problem of justification, said, at p. 618 :

The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell.

In *Brimelow v. Casson* (9), RUSSELL, J., said, at p. 311 :

. . . in analysing or considering the circumstances, I think that regard might be had to the nature of the contract broken ; the position of the parties to the contract ; the grounds for the breach ; the means employed to procure the breach ; the relation of the person procuring the breach to the person who breaks the contract ; and I think also to the object of the person in procuring the breach.

On the finding of the judge in this case, the respondents thought that, if the patent agents certified that Doherty had a patentable method, they could safely use it and employ him. They were without a fraudulent mind. That is to say, they did not intend to get, but only suspected that if they were not advised to the contrary they might get, a process which was secret. In these circumstances, I think that, even if the publication of the secret to their patent agents by Doherty was procured by them, they had a lawful excuse or justification for asking him to take steps which, if proper ones, would have protected both the plaintiff company and themselves from any risk of misuse by themselves or Doherty. It would be impossible as a matter of business in such a case for any person to whom a process was offered, who wished *bona fide*

to be sure before receiving it that it was not secret, to send the vendor to an expert in order that the proposed purchaser might be advised on such a matter, if, the advice being unfavourable and technically amounting possibly to a breach of contract of secrecy on the part of the vendor as a confidential servant of others, the purchaser were to be subjected to a risk of action in a case where his whole proceedings were entirely *bona fide* and founded on a desire to act lawfully. The question of justification must depend entirely upon the facts of the particular case. However, accepting, as I do, the *dictum* of RUSSELL, J., in *Brimelow v. Casson* (9), considering all the circumstances, the nature of the contract broken, and the object of the person in procuring the breach, I think that this is a case where it should be held alternatively that there was justification in the desire of the defendants not to break the law.

It has further been argued that, in so far as damage is of the gist of the action, there is no proof that by the secret matter being published to the patent agents under secrecy the plaintiffs suffered any damage. In such a case, however, it is not necessary to give proof of special damage. The damages are damages at large. LORD ESHER, M.R., in *Exchange Telegraph Co. v. Gregory & Co.* (10), said, at p. 153 :

... it is enough to show that the act complained of was ... likely to damage the plaintiff, though proof of specific damage be not given.

As was said in *Goldsohl v. Goldman* (11), at p. 603 :

... where the breach which has been procured would in the ordinary course inflict damage on the plaintiff, the plaintiff may succeed without proof of particular damage.

Owing to the manner in which this case was argued in the court below, I do not think that this particular question really arises for determination. I have carefully read the speeches of counsel in this case, and the claim for damages, according to Mr. Oliver (as he then was) for the plaintiffs, was based upon the assumptions that the plaintiffs had lost trade and profits and that their processes had been published, but I doubt whether any damage was sought to be attributed to the publication to the patent agents as such. It is said by Mr. Shelley that the subsequent publication of the complete specification flowed as a natural consequence from the report of the patent agents as to patentability, itself the result of the original reference to them, and that there was no *novus actus interveniens*. However this may be, I think, on the authorities, that he is right in saying that it is open to him, once he has established an invasion of his rights, to say that publication to the patent agents alone would support a claim for damages, and that the extra amount of such damage would have to be investigated hereafter. However, for the reasons I have already stated, I think that the plaintiff company fails, and the question of actionable damage does not arise.

I would add, in conclusion, that it was also sought to be said that the judge was wrong in refusing to find conspiracy between Doherty and the

defendant company. This seems to me to be entirely a question of fact, and I cannot find in the evidence any reason to come to the conclusion that there was here any wrongful combination of the various defendants wilfully to injure the plaintiffs by unlawfully becoming possessed of their secret and confidential information, thereby depriving them of its exclusive use and obtaining the benefit thereof themselves, so as to compete with the plaintiffs, and securing patent protection of the same within the meaning of para. 6 of the statement of claim. For the reasons above-mentioned, I think that the judge was right in finding that the respondents did not act wilfully with that intent against the plaintiffs, and that there is no evidence of a wilful combination between them and the defendant Doherty. I am of opinion, therefore, that this appeal fails, and must be dismissed with costs. A B

MACKINNON, L.J. : On June 22, 1934, the defendant Doherty wrote to the defendant company stating that he had been in the employment of the plaintiffs, and suggesting that he had knowledge which might be of service to the defendant company. As a result, Mr. Ferguson and Mr. Welch, two of the directors of the defendant company, interviewed him on June 27, 1934. Mr. Ferguson declined to listen to details of the process which Doherty said he knew, and instructed him to go to the patent agents, Heseltine, Lake & Co. He was to tell them all about his process, and, if they found that a patent could be obtained for it, the defendant company would give Doherty employment. They also agreed to pay the patent agents' charges. As a result of this arrangement, Heseltine, Lake & Co. eventually applied for a patent in Doherty's name. A provisional specification was filed on Feb. 11, 1935, and a final specification on July 19, 1935. The process of manufacture described in the final specification was thus revealed to the world in July, 1935. In fact, this process was the one that the plaintiff company had for some years successfully employed. It was their secret process. Doherty knew of it by reason of his previous employment by the plaintiffs, and in revealing it to anyone he was committing a breach of his contract with the plaintiffs. C D E F

The plaintiffs, having, to their consternation, become aware of the contents of the final specification of Doherty's patent, took steps to prevent the patent from being granted to him. On Feb. 26, 1937, they also brought the present action against the defendant company, Mr. Ferguson, and Doherty. As regards the defendant Doherty, PORTER, J., has held that his action in revealing the plaintiffs' secret process was a breach of contract, and has awarded the plaintiffs £15,000 damages. Doherty does not appeal. The judge entered judgment for the defendant company and Ferguson, and against this part of his judgment the plaintiffs appeal. Their claim against these defendants was of a twofold nature, (a) that they had induced Doherty to break his contract with them by revealing the process, and (b) that they had G H

conspired with Doherty to procure that result. However, I think that the same considerations apply to either form of claim.

A Intentionally and without lawful justification to induce anyone to break a contract made by him with a third party is a tort, if damage has thereby been occasioned to the third party. It has been put more briefly in *Quinn v. Leathem* (3) by LORD MACNAGHTEN, at p. 510 :

... a violation of legal right committed knowingly is a cause of action. . .

B It has been found by PORTER, J., that the essential fact that the defendants "knowingly" or "intentionally" induced Doherty's breach of contract has not been established. It was admitted by Ferguson that, when Doherty first came, he was apprehensive that he might be going to tell him something which, by reason of his previous relations with the plaintiffs, he ought not to do. This apprehension arose because of a previous discreditable incident between Ferguson and an employee of another company, which had resulted in police court proceedings against Ferguson. He therefore declined to be told anything by Doherty, and sent him to interview the patent agents. PORTER, J., finds that in a muddle-headed way he thought that what the patent agents considered patentable by Doherty could not, for that very reason, be a secret, but must be open to Doherty's use, or to his own use, if Doherty assigned the patent to him. In short, he has vindicated the honesty of Ferguson at the expense of his intelligence.

E Whether Ferguson was acting knowingly and intentionally, or honestly but stupidly, is a pure question of fact. *A priori*, I should find it difficult to imagine that anyone could be so stupid. However, PORTER, J., saw Ferguson in the box, and had opportunities that I have not of estimating his state of mind (and perhaps his powers of mind). It is impossible for us to differ from his finding of fact. I think that there is no question but that he applied the right test of law, and this appeal therefore fails.

F Mr. Shelley, in arguing the appeal, urged upon us one aspect of the case that I think was not argued below. The finding of PORTER, J., as to Ferguson's stupid belief absolved Ferguson from liability in regard to Doherty's publication of the secret process in the final specification of the patent. Nevertheless, said Mr. Shelley, Ferguson told Doherty to go and reveal the process to Heseltine, Lake & Co. Directly Doherty, did that, he broke his contract with the plaintiffs, and Ferguson, avowedly apprehensive that Doherty might be in possession of information belonging properly to the plaintiffs, told him to reveal it to Heseltine, Lake & Co., with the very purpose, as has been found, of seeing whether or not it was a matter that could be legitimately disclosed and used. As to the revelation to Heseltine, Lake & Co., therefore, clearly induced by Ferguson, it cannot be said that he did not intentionally induce that which he knew might be a breach of Doherty's contract. This aspect of the case is not dealt with by PORTER, J., for it was not argued before him. I think that the argument fails for this reason. I said earlier that intentionally

to induce a breach of contract with a third party is a tort, if damage has thereby been occasioned to that third party. It may well be that the claim of the third party is not limited to the special damage which he can prove. That he has sustained some damage, however, is of the essence of his cause of action. In this case, the revelation to Heseltine, Lake & Co. by itself occasioned no damage to the plaintiffs. The damage to A them resulted from the publication of the final specification, but that was not the necessary result of Ferguson telling Doherty to explain his process to Heseltine, Lake & Co. They might have reported that no patent could be obtained. They in fact thought that it could be, and filed the specification which caused the damage to the plaintiffs, but in respect of B that the defendants have been relieved of liability by the judgment of PORTER, J. In the result, I think that this appeal must fail.

FINLAY, L.J. : I agree in thinking that this appeal fails and must be dismissed. It is unnecessary that I should restate the facts. The plain- C tiffs alleged two distinct causes of action, (a) conspiracy against all the defendants, and (b) the inducing of a breach of agreement against the defendant Ferguson and the defendant company. These causes of action were regarded in the court below as standing or falling together, and this view is, I think, correct. The essence of conspiracy is the co-operation D of the minds of the conspirators in pursuance of the unlawful design. A person could never be liable for conspiracy, either in a civil or in a criminal court, if he had no knowledge that the design was unlawful, and the essence of the action for inducing a breach of contract is knowledge on the part of the defendant. There never could be liability for E that tort unless it was shown that the defendant knew that there was a contract, and, having that knowledge, induced its breach. The judge found—and there is no appeal as to this—that the process was the plaintiffs' secret process, and was used by the defendant Doherty in breach of his agreement, either express or implied. As to the causes of F action in conspiracy and for inducing the breach of contract, the judge found :

They suspected that his knowledge was, at any rate in the main, derived from his experience at the plaintiffs' works, and that his process might be their process or some part of it, and secret. On the other hand, it was possible that Doherty might have some process of his own which was patentable, and not secret. In G these circumstances, frightened by their former experience, they referred him to their patent agents, leaving them to ascertain whether the process was patentable or not, and postponing its revelation until that question was ascertained. If they had thought about it, they must have realised that, though the process might have sufficient novelty to be the subject of a patent, yet that was no proof that it was either invented or patentable by Doherty. They should further have known that, if it were not his, the very act of applying for a patent would reveal all parts of the process both to the defendants themselves and to the world at large. They must H have realised this, had they thought about it, and it would, in my view, be enough if they judiciously refrained from thinking lest an unwanted enlightenment should be vouchsafed to them. However, the question whether they did think or refrained from thinking about the matter has still to be determined. They would not, in my view, have been unwilling to use the plaintiffs' process, even though parts of it might be secret, if they thought that they could safely do so, but I do not think that it ever occurred to them that the revelation of the process to their agents or to

the public, if a patent were applied for, would be to reveal something which was secret. In a muddle-headed way they thought that what their agents considered was patentable by their co-defendant would, for that very reason, not be secret, but open to Doherty's use, and that of his assignees or co-patentees. It did not occur to them that Doherty could be making a false claim, or that he might be revealing his employers' secrets, provided that, before the revelation, they had been assured that he had something which could be the subject of a patent. To them, that fact was decisive of the question whether or not they were obtaining the plaintiffs' secrets. A logical mind would have seen the fallacy of such a belief, but neither Ferguson nor his co-director have logical minds, and, though they ought to have realised that their fear of the revelation to them of something which the law did not allow them to know ought not to have been allayed by an opinion from their patent agents that the process was patentable, yet in fact I find that they thought not only that no action would lie if they induced such a revelation, but also that the process, once found to be patentable, would be proved not to be secret. They knew that the plaintiffs were working under a series of patents, and they thought that those patents were their real protection. For this belief they received some support at their interview with Mr. Chance between the date of their first conversation with Doherty and the disclosure of the process to them, since Mr. Chance, in the course of conversation, had told Mr. Ferguson that he would have difficulty in making any powder without infringing the plaintiffs' patents, and similar observations were already to be found in Mr. Chance's address before the Institute of the Plastics Industry. If they had induced Doherty to disclose the process at the first interview, they would, in my view, have been liable, because they suspected that Doherty might be about to disclose the plaintiffs' secrets, and they would have induced that disclosure. I think, however, that their refusal to have the process disclosed then was because they were suspicious, and wished to know whether or not their suspicions were justified, and that they referred the matter to their patent agents in the belief—illogical but actual—that, if those agents found the process patentable, their suspicions would be proved to be unfounded, and the process neither secret nor confidential.

An appeal is, of course, a re-trial, but it is quite clear that, in a case such as this, where the view taken of the facts must depend to a large extent upon the impression made by the various witnesses, it is not open to this court to depart from or qualify the findings of fact of the judge. A good deal of the elaborate argument for the appellants appeared to me to be intended to suggest that the judge was wrong in his finding, and that he ought to have found that those acting for the defendant company, and particularly Mr. Ferguson, had a fraudulent mind. To that argument we cannot, even if we desired to do so, give effect. The legal result is stated by the judge in these words:

If this was the state of their mind, what is the legal result? It was not argued before me, and indeed I do not think it could have been argued, that the defendant company were liable for inducement, or that the defendant company and Doherty were liable for conspiracy, unless those acting on behalf of the defendant company had a fraudulent mind—that is to say, intended to get, or suspected they would get, a process which was secret. I think that those persons were both negligent and muddle-headed, but I do not find that their mind was fraudulent. In these circumstances, the case against them fails, and with it any claim against Doherty for conspiracy.

I think that he was correct in the conclusion at which he thus arrived. If the claim in conspiracy is considered, it seems to be clear that Mr. Ferguson could not be liable in conspiracy when he did not know that there was any illegality. If the claim for inducing breach of contract is considered, it seems to be clear that he could not be liable for inducing breach of contract when he was not aware that any contract was being broken. Moreover, this view is not, I think, affected by the circumstance that, as the judge finds, Ferguson and Welch suspected that the process

might be the plaintiffs' secret, and were both negligent and muddle-headed.

Accepting, as I do, the findings of the judge, the substance of this matter can, I think, be stated quite concisely. Doherty brought a process to Ferguson. Ferguson saw that it might be valuable, but feared that it might be secret, and did not wish to use it if it was. He therefore referred the matter to eminent patent agents, supposing, muddle-headedly but honestly, that, if they reported that the process was patentable, it could not be secret. They did report that it was patentable, and the publication followed. It seems reasonably clear, if this short statement of the facts is accurate, that Mr. Ferguson could not be liable either for conspiracy or for inducing a breach of contract. On this ground I rest my conclusion that the judge was right.

Appeal dismissed with costs. Leave to appeal.

Solicitors: *Crane & Hawkins* (for the appellants); *Charles G. Bradshaw & Waterson* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

HUGH'S SETTLEMENT, LTD. v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), November 10, 1938.]

Income Tax—Exemptions—Charity—Provident society—Dividends limited to an amount fixed by the Treasury—Income Tax Act, 1918 (c. 40), s. 37 (1) (a).

A society duly registered under the Industrial and Provident Societies Act, 1893, claimed exemption from Sched. A income tax in respect of land held by them, on the ground that such land was vested in them for charitable purposes only. They based this claim upon the fact that the rate of dividend upon the share capital of the society was limited to an amount fixed by the Treasury:—

HELD: since one of the purposes of the society was to pay to its members dividends out of its profits, it could not be entitled to the benefit of the exemption given to charities by the Income Tax Act, 1918, s. 37 (1) (a). The limitation of dividend was in this respect immaterial.

[EDITORIAL NOTE.] Although there seem to have been many objections to the exemption of this company as a body established for charitable purposes only, the appeal was taken on the short point that the limitation of dividend was decisive in favour of the exemption. The judge, however, has held that the mere payment of dividends to members, although only allowed to a limited amount, prevents the society from being one established only for charitable purposes.

AS TO CHARITABLE PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 22-24, para. 35; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.]

Case referred to:

(1) *Inland Revenue Comrs. v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; Digest Supp.; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58.

CASE STATED under the Income Tax Act, 1918, s. 149, and the Finance Act, 1925, s. 19, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the

High Court of Justice. Hugh's Settlement was founded as a social experiment, and its aim was to build up a settlement of industrious and contented people, to be in turn the mother of other affiliated settlements both at home and in the Dominions, and so help towards a fuller realisation of the ideals for which the British Empire stands. It had not been found possible to put into operation the original aim of the society, and, at the time that the assessment was made, some of the property of the society was let at economic rents, and other evidence was given to show that it was carrying on a business. The rules of the society provided for the payment of a dividend upon the share capital at a rate not exceeding the rate for the time being prescribed by the Treasury. The only point taken upon the argument before MACNAGHTEN, J., was that the limitation of dividend brought the company within the exemption of charitable societies under the Income Tax Act, 1918, s. 37 (1) (a).

E. F. M. Maxwell for the appellants.

C. The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the respondents.

MACNAGHTEN, J.: The appellants, Hugh's Settlement, Ltd., a body corporate duly registered under the Industrial and Provident Societies Act, 1893, claim exemption from tax under Sched. A in respect of land held by them. They claim the benefit of the exemption given to charities by the Income Tax Act, 1918, s. 37 (1) (a), which reads as follows :

(1) Exemption shall be granted (a) from tax under Sched. A in respect of the rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes so far as the same are applied to charitable purposes only...

The lands in question on which this assessment has been made are the property of the appellants. By the rules of this society, the members are entitled to dividends on their shares, payable out of the profits of the society. The case stated says that the rate of dividend is limited to an amount fixed by the Treasury, but the fact that the rate of dividend is limited is immaterial. It seems to me impossible to maintain that the case comes within the provisions of the subsection, since one of the purposes of the society is to pay to its members dividends out of its profits.

Mr. Maxwell, for the appellants, urged that *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (1) was in his favour, but in that case the members of the society obtained no pecuniary benefit. I think that the appeal fails, and must be dismissed.

Appeal dismissed with costs.

Solicitors: *Monier-Williams & Milroy* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

Re CLEADON TRUST, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
October 13, 14, 17, November 25, 1938.]

Companies—Winding up—Proof—Voluntary payment—Payment of sums guaranteed by company—Whether request implied—No quorum of directors—Impossibility of request or ratification. A

The appellant was a director of three limited companies, one a parent company, the other two being subsidiary companies. The companies were private companies, largely, if not wholly, under the control of the appellant. The subsidiary companies were indebted in certain sums, and were without funds to meet the payment of those sums when they fell due. The parent company had guaranteed the payment of these sums, but it also had no sufficient funds available. In these circumstances the appellant on eight occasions, in the case of the first two by arrangement with the then managing director and in the case of the last six by arrangement with the secretary of the company, purported to advance sufficient money to the parent company to meet these obligations, which, however, were in fact discharged by the subsidiary company concerned. The payments were made by cheque, in the case of the first payment drawn in favour of the parent company and indorsed over to the subsidiary and in all other cases drawn in favour of the creditors and sent to them by the subsidiary company. The amounts of these cheques were entered in the appellant's ledger account of the parent company, and were debited to the appropriate subsidiary company in the parent company's books. At all material times there were only two directors of all the companies, and the articles required a quorum of two directors for a directors' meeting, and provided that an interested director should not vote, but declared that this prohibition should not apply to "any arrangement for giving a director security for advances or by way of indemnity." A resolution was passed by the directors purporting to confirm these advances as made at the request of the parent company. The parent company was the holder of all the debentures issued by the subsidiary companies. All the companies being in liquidation, the appellant sought to prove in the liquidation of the parent company in respect of such advances:— B C D E

HELD: (i) the facts of this present case could not be brought within the expression "giving a director security for advances or by way of indemnity." F

• (ii) (SIR WILFRID GREENE, M.R., dissenting) it being impossible for the directors to pass a resolution requesting the advance of these sums, the case was one where an unsought benefit had been conferred on the company by a stranger, the appellant, and the appellant had no equitable right of recoupment against the company. G

[EDITORIAL NOTE.] The majority of the court have decided this case upon the absence of any request by the parent company to pay these debts or to relieve it of any liability under its guarantee. The parent company, by reason of there being only one uninterested director, was, as SCOTT, L.J., phrases it, "paralysed." There was no one who could, under the constitution of the company, make a valid request or a valid ratification of any act done. SIR WILFRID GREENE, M.R., on the other hand, takes a wider view than the other members of the court of the effect of a passage in the judgment of ROMER, L.J., in *Bannatyne v. MacIver* (4), at p. 109, and finds it possible to bring the facts within the principle there stated. He based the liability of the company to refund such money upon the fact that the payments operated to discharge *pro tanto* the liability under the parent company's guarantee. H

AS TO MONEY PAID VOLUNTARILY, see HALSBURY, Hailsham Edn., Vol. 7,

pp. 266, 267, para. 368; and FOR CASES, see DIGEST, Vol. 12, pp. 522-526, Nos. 4341-4378.]

Cases referred to :

- (1) *Re Cork & Youghal Ry. Co.* (1869), 4 Ch. App. 748; 20 Digest 244, 101; sub nom. *Re Cork & Youghal Ry. Co., Ex p. Overend, Gurney & Co., Ltd., & London, Hamburgh & Continental Exchange Bank, Ltd.*, 39 L.J.Ch. 277; 21 L.T. 735.
- (2) *Sinclair v. Brougham*, [1914] A.C. 398; 12 Digest 282, 2317; 83 L.J.Ch. 465; 111 L.T. 1; affg. S.C. sub nom. *Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183.
- (3) *Leigh v. Dickeson* (1884), 15 Q.B.D. 60; 12 Digest 533, 4429; 54 L.J.Q.B. 18; 52 L.T. 790.
- (4) *Bannatyne v. MacIver*, [1906] 1 K.B. 103; 1 Digest 318, 387; 75 L.J.K.B. 120; 94 L.T. 150.
- (5) *Reversion Fund & Insurance Co. v. Maison Cosway, Ltd.*, [1913] 1 K.B. 364; 1 Digest 318, 388; 82 L.J.K.B. 512; 108 L.T. 87.
- (6) *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.*, [1928] 1 K.B. 48; Digest Supp.; 97 L.J.K.B. 1; 137 L.T. 443.
- (7) *Jenner v. Morris* (1861), 3 De G. F. & J. 45; 27 Digest 205, 1772; 30 L.J.Ch. 361; 3 L.T. 871.
- (8) *Paynter v. Williams* (1833), 1 Cr. & M. 810; 12 Digest 217, 1769; sub nom. *Painter v. Williams*, 2 L.J.M.C. 105.
- (9) *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234; 12 Digest 523, 4355; 56 L.J.Ch. 707; 56 L.T. 220; subsequent proceedings. (1887), 57 L.T. 39.
- (10) *Exall v. Partridge* (1799), 8 Term Rep. 308; 12 Digest 526, 4385.
- (11) *Reid v. Rigby & Co.*, [1894] 2 Q.B. 40; 12 Digest 551, 4583; 63 L.J.Q.B. 451.
- (12) *Underwood (A. L.), Ltd. v. Bank of Liverpool, Underwood (A. L.), Ltd. v. Barclays Bank*, [1924] 1 K.B. 775; Digest Supp.; 93 L.J.K.B. 690; 131 L.T. 271.
- (13) *Lloyds Bank v. Chartered Bank of India, Australia & China*, [1929] 1 K.B. 40; Digest Supp.; 97 L.J.K.B. 609; 139 L.T. 126.
- (14) *Re Airedale Co-operative Worsted Manufacturing Society, Ltd.*, [1933] Ch. 639; Digest Supp.; 102 L.J.Ch. 229; 149 L.T. 92.
- (15) *Lampleigh v. Brathwait* (1615), Hob. 105; 12 Digest 215, 1744.
- (16) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; 9 Digest 97, 406; 25 L.J.Q.B. 317.

APPEAL from an order of BENNETT, J., dated Apr. 12, 1938, confirming the rejection of a proof by the liquidator of the company to the extent of £18,254 7s. 3d. The appellant asked that the order might be reversed or varied, and that the proof might be allowed in full.

F. R. Evershed, K.C., and *Roger W. Turnbull* for the appellant.

Lionel Cohen, K.C., and *K. W. Mackinnon* for the respondents.

Evershed, K.C.: The minutes of the board of the company showed that at a meeting of the directors a resolution was passed confirming the advances of £18,254 7s. 3d. made by the appellant to P.B.C. Requests for the advances had been made by the secretary of Cleadon Trust, Ltd. Whether or not there should have been an independent quorum depends upon whether the resolution can be described as the giving of security to a director for advances or the giving of an indemnity.

It is not necessary within the meaning of the relevant article that the advances should have been made by a director to the parent company. The advances were made in the expectation that the company would repay them. The company has taken the benefit of the payments, and it has had notice of them. The secretary of the company was the agent of the company to receive the notice. If notice of a fact of this kind is given to a director in connection with the company's business, it is in fact given to the company. If a company has only two directors, and one of them has notice already, notice to the other is notice to the company. If notice is given, the result is not a contract implied in fact, but a promise implied in law. It is really an equity. The contract arises out of an equity, because it would be inequitable for the company to retain the advantage for itself without its being under any liability therefor. Where an outsider pays a debt of a company, the outsider is entitled to claim repayment. The appellant has been held entitled to prove in respect of moneys that went into the company's account. The liquidator draws a distinction where the money has not gone into the company's account, but to some other person directly. The distinction is not well-founded. Cleadon Trust, Ltd., were under a liability as guarantors to Carlisles. It is tolerably clear that all the sums which the appellant found were to be considered as due to him. The minutes make it quite plain that the other director knew how the loans were being dealt with. When moneys are being paid over a considerable period of time, it is natural to assume that a certain practice is set up. It would not be natural to suppose that on every individual occasion the two or three men concerned would discuss the matter as they would on the first occasion. The figures which appear on the balance sheet as showing what was due to the appellant show that he was not making the advances on behalf of Cleadon Trust, Ltd., except on the expectation that he would be repaid. What has been done in the present case has been acquiesced in by the company. [Counsel referred to *Reid v. Rigby & Co.* (11) and *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6).]

Turnbull: With regard to the doctrine of *ultra vires* as affecting the present case, the four requisite conditions stated in SMITH'S LEADING CASES have been fulfilled. If the court is against the appellant on the question of acquiescence, it is not necessary that there should be any acquiescence while the company is a going concern. If the four principles referred to in *Lampleigh v. Brathwait* (15) are established, there is a contract. Apart from that, an equitable principle is applicable, and the winding up of a company makes a good deal of difference. While the company is a going concern, it may not want its debts to be paid, but, when there is a liquidation, the matter assumes an entirely different aspect. It is then a question, not of debts, but of distribution of assets, and they have to be distributed in the right way. It may be that somebody has given a benefit to the company without the acquiescence of the company, and, when the assets are to be distributed, equity says

that it is not right that the shareholders should take something which has been provided by somebody else, who had no intention whatsoever of benefiting the shareholders. Where there has been either an *ultra vires* borrowing by the company or an *intra vires* borrowing, but without the authority of the company, on a liquidation, in so far as the company

A has received a benefit which has affected the assets at that time, it is inequitable that the shareholders should receive any payment before the lender has received the amount of his advance. Where, as in the present case, a director of a company has expended money for the benefit of that company, in the expectation of being repaid, on a liquidation

B occurring, if the benefit is still manifest in the assets of the company, it is inequitable that the assets should be distributed to the shareholders except upon the footing that the person who has made the payment should be repaid. If the appellant had not paid, Cleadon Trust, Ltd., would have had to pay, and therefore its assets are enhanced to the

C extent of the payment made by the appellant. The matter does not rest upon acquiescence in the case of an *ultra vires* borrowing, because no acquiescence can be operative. There can be no acquiescence in an illegal act. Even if there was no acquiescence, there was knowledge of money being borrowed by an agent of the company and applied in the

D discharge of the company's obligations. [Counsel referred to *Sinclair v. Brougham* (2), *Underwood (A. L.), Ltd. v. Bank of Liverpool* (12), *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6) and *Re Airedale Co-operative Worsted Manufacturing Society, Ltd.* (14).]

Cohen, K.C. : If the principle referred to applies at all, it can only

E apply to those debts for which the company was liable. The basis of the principle in the cases cited is that money has been applied in the discharge of debts for which the company was liable. In the present case, the money never became the property of Cleadon Trust, Ltd. The cheque was never paid into the banking account of Cleadon Trust, Ltd.

F It is clearly the fact that the name of Cleadon Trust, Ltd., was inserted in the cheque, and it was purported to have been indorsed on behalf of Cleadon Trust, Ltd., but the fact that the appellant's bankers paid it does not support the claim. It is for the appellant to discharge the onus which rests upon him of showing that the money ever got into the

G hands of Cleadon Trust, Ltd. The principle of all the cases cited, except possibly *Underwood (A. L.), Ltd. v. Bank of Liverpool* (12), is that the company has become a trustee of the money, and, if the money is still in the bank of the company, it is trust money, which the lender is entitled to follow. If the company has applied the money in discharge of debts,

H the company cannot be heard to say that it has applied the money of somebody else in discharge of its own debts without making the amount good. The fundamental distinction is between cases where the money has gone into the company's own pocket, either actually or notionally, and cases where the company has never received it. The appellant knew that payment had never been communicated to anybody capable

of binding the company, and therefore he could not bring himself within the principle cited from SMITH'S LEADING CASES. All the cases cited, except *Underwood (A. L.), Ltd. v. Bank of Liverpool* (12) and *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6), were cases in which equitable principles were applied on analogy. *Underwood (A. L.), Ltd. v. Bank of Liverpool* (12) was an attempt to recover damages for conversion. A So far as *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6) goes, it was an extension of *Underwood (A. L.), Ltd. v. Bank of Liverpool* (12), but the analogy is not really a fair one. [Counsel referred to *Falcke v. Scottish Imperial Insurance Co.* (9), *Leigh v. Dickeson* (3) and *Royal British Bank v. Turquand* (16).] B

SIR WILFRID GREENE, M.R.: The appellant was at all material times one of the only two directors of Cleadon Trust, Ltd., which I will refer to as the company. The company owned shares in, and all the debentures of, two subsidiary companies—namely, Carlisle Builders, C Ltd. (incorporated in 1926), and the Property and Building Corporation, Ltd. (incorporated on Oct. 24, 1930), which I will refer to as Carlisles and P.B.C. respectively. The boards of all three companies were the same, and a Mr. Antrobus was in each case the secretary. Previous to Aug. 6, 1931, a Mr. Jackson was the other director, and managing D director of all three companies. After that date, his place as director was taken by a Mr. Kelly, but there was no managing director of any of the three companies.

For some time before the events which give rise to the present claim, the appellant had been in the habit of advancing large sums to the E company at the request of Mr. Jackson, its managing director. On one occasion at least—namely, on Oct. 27, 1929—at the like request, a sum was paid by the appellant to Carlisles upon the footing that the company should be liable to repay the amount to the appellant. All sums so provided by the appellant were entered in a ledger account in the F appellant's name in the company's books. After Mr. Jackson left the company, the appellant continued to make advances to the company. He also provided certain sums of money for the subsidiaries in the circumstances hereinafter stated. In the case of the advances made and the sums provided while Mr. Jackson was managing director, there G may have been a binding obligation on the company to repay, since the transactions may have been within the scope of a managing director's authority. I refer to this point later. However, in the case of the advances made and the sums provided after Mr. Jackson's departure, no H binding contract could be made, for reasons which will appear. No question arises on this appeal as to the right of the appellant to prove in respect of sums actually received by the company. The appeal relates solely to sums provided for the subsidiaries in circumstances which I will now explain.

The two subsidiary companies were interested in a block of flats called

Tufton Court. In 1930 and 1931, these flats were being constructed by a building company called Hammond & Barr, Ltd., to which I will refer as the builders. In the first instance, Carlisles had entered into a contract with a Mr. Warwick Brookes, who at that time was the building lessee, to provide him with moneys which he required in order to pay

A the builders their instalments under the building contract which he had made with them. The performance of this contract by Carlisles was guaranteed by the company by a document of Oct. 3, 1930, addressed to Mr. Warwick Brookes, which I will refer to as the first guarantee. Subsequently, the interest of Mr. Warwick Brookes was taken over by

B P.B.C., who became liable to pay the builders, and their liability was guaranteed by the company by a document of Apr. 9, 1931, addressed to the builders, which I will call the second guarantee. The flats were completed, and a lease of them was taken by P.B.C. During the construction of the flats, there became due to the builders sums of money

C which fell to be found by Carlisles during the currency of the first guarantee and by P.B.C. during the currency of the second guarantee. Neither the subsidiary companies nor the company had the necessary funds, and the appellant from time to time provided money for the purpose. He did so, in the first two cases, at the request of Mr. Jackson, and, in the remaining cases, at the request of Mr. Antrobus, with the knowledge and approval of Mr. Kelly. The sums so provided for payment of the builders were eight in number. The first was a sum of £2,000 provided while Mr. Jackson was managing director on Jan. 2, 1931—that is, during the currency of the first guarantee, when the money

E for payment of the builders fell to be found by Carlisles. The other seven, amounting in all to £13,875, were provided during the last six months of 1931—that is, during the currency of the second guarantee, when the money for payment of the builders fell to be found by P.B.C. The earliest of these seven payments—namely, £2,500 on July 29, 1931

F—was made while Mr. Jackson was managing director. The remaining six were made after he had left. In view of the inability of the two subsidiary companies to find the sums which fell to be found by them respectively, the company would have been liable to find them under the guarantees, but it had no money available for the purpose. When

G the appellant provided these sums, it was understood and arranged between himself and Mr. Jackson (in the case of the two earliest payments) and between himself and Mr. Antrobus (in the case of the other six payments) that they were to be treated as advanced by the appellant to the company. The amounts were accordingly entered in his ledger

H account, and were debited to the subsidiaries respectively in the company's books. In the case of the last six payments, Mr. Kelly knew of, and assented to, the arrangement. Interest on the sums in question was from time to time paid to the appellant by the company, or credited to him in account. The amounts were provided in each case by cheque drawn by the appellant on his bankers. The cheque for £2,000 was

drawn in favour of the company. It was apparently indorsed by some person purporting to act on behalf of the company whose identity was not ascertained by the evidence—for the cheque was not produced—and paid into the banking account of Carlisles, who used it towards paying to the builders a sum of £2,125 then due to them under the architect's certificate. The remaining seven sums were provided by A
cheques drawn in favour of the builders and sent to them through P.B.C., presumably by Mr. Antrobus, who was, as I have already stated, the secretary of that company also. The statement in the judgment of BENNETT, J., that these seven sums were paid to P.B.C. by cheques B
drawn in favour of that company is due to a misapprehension on his part. The amounts of these eight payments, amounting together to £15,875, form the greater part of a sum of £17,353 7s. 11d., for which the appellant claims to be entitled to prove in the voluntary winding up of the company. The liquidator rejected the claim for this amount, and his decision was upheld by BENNETT, J. The rest of the sum of C
£17,353 7s. 11d. I will deal with later.

The company and its two subsidiaries are in liquidation. Such assets as the subsidiaries may have are insufficient to discharge the amounts owing on their debentures, and accordingly any claim which the appellant might have had against them is worthless. The result of the payments D
made by the appellant was in each case to extinguish a debt for which in the first case Carlisles, and in the other seven cases P.B.C., were liable, and the extinction of those debts operated to relieve the company of the corresponding liability under its guarantee. If the appellant's claim E
fails, the shareholders of the company will benefit by the payments which he made, for, if the money had been found by the subsidiaries themselves (assuming that to have been possible), the assets of those companies would have been depleted, and there would have been less to come from them to the company as the holder of all their debentures. If, F
on the other hand, the company had found the money as guarantor, its own assets would have been diminished, since claims by the company against the subsidiaries as principal debtors for recoupment would, on the facts, have been valueless.

The fact that the first two payments were made upon the request of Mr. Jackson, who was then still managing director, was not relied upon G
before us, all the eight payments being treated upon the same footing, so far as regards the existence of any person capable of binding the company. Upon the view which I take, it is not necessary to consider whether or not in those two cases the company became contractually H
bound, and I will deal with them without reference to Mr. Jackson's possible authority as managing director.

If the company had had an independent board of directors, and if that board had requested the appellant to provide these sums, or had known of, and acquiesced in, their provision, the appellant's claim, in the circumstances stated, would have been a good one. However, there

was no such board, since of the only two directors one—the appellant—was interested, and by art. 124 of the company's articles of association two directors were necessary to form a *quorum*. An attempt was made to avoid this difficulty by means of art. 116, coupled with what purported to be a resolution of the board of directors of the company passed on Dec. 5, 1932. Under that article, the common prohibition against voting by an interested director is declared not to apply to :

... any arrangement for giving a director security for advances or by way of indemnity.

The resolution purported to "confirm" the "advances" to P.B.C. by the appellant which were said to have been made "at the request of the Cleadon Trust, Ltd." It was said in the first place that the arrangement by which the appellant was to be treated as having advanced the sums in question to the company was "an arrangement for giving a director security for advances," and that the approval of his co-director was sufficient to give it validity. It was said in the second place that it was an "arrangement by way of indemnity." I cannot accept either of these arguments. With regard to the former, it is sufficient to point out that there was never any "advance," since, in order that there might be an advance, a resolution of an independent board was required. With regard to the latter, the words, on their true construction, mean, in my opinion, not "arrangement by way of indemnity," but "an arrangement for giving a director security by way of indemnity," and the facts of the present case cannot be brought within that expression.

This brings me to the substantial questions in the case. It was argued that the facts of the present case brought it within a principle which, for present purposes, I can take as stated with sufficient accuracy in SMITH'S LEADING CASES, 13th Edn., Vol. 1, p. 156. It is there said that :

... if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done : and that will import a promise to pay for it.

In my opinion, the facts of the present case are not sufficient to bring this principle into play. Two things at least are essential for its application—namely, knowledge and acquiescence on the part of the person sought to be charged with liability. The knowledge required must, I think, be knowledge which will lead to the possibility of effective action by refusing to accept liability. In the present case, the company had no such knowledge, for, of its three officers who knew the facts, one—the appellant—was disqualified from taking part in any decision on the matter, another—his co-director—could not alone come to any decision, while the secretary had no power at all in the matter. It was suggested that the other director could have taken action by calling a meeting of the company and submitting the question to it. This argument is, in my opinion, unsound. However, apart from the question of knowledge, there was not, and could not have been, any acquiescence by the company in the absence of an independent board.

‘ This, however, does not dispose of the matter, since the appellant relies upon a principle of equity under which a person who has advanced money to pay the debts of another may, in certain circumstances, be entitled to claim repayment against that other, notwithstanding that no liability to repay exists at law. This aspect of the case is not dealt with in the judgment of BENNETT, J. I proceed to examine the nature and scope of this principle, and the authorities in which it has been discussed and applied. Three lines of authority were referred to, of which two have, in my opinion, no immediate relevance to the present question. Of these two, one is concerned with corporations which, having exhausted their borrowing powers, borrow money from a lender and apply it in payment of existing debts lawfully incurred. In such cases, the lender can recover from the company the amount so applied. An example is to be found in *Re Cork & Youghal Ry. Co.* (1). The principle underlying these cases has not yet been finally ascertained. It may be that the borrowing ought not to be treated as *ultra vires* the company at all, or it may be that the lender is subrogated to the rights of the creditors who have been paid off: *per* LORD PARKER in *Sinclair v. Brougham* (2), at p. 441. Whichever view be the right one, I do not find any assistance in these decisions.

The other line of cases is that of which *Sinclair v. Brougham* (2) is itself the leading example. That was a case in which persons had deposited money with a building society in the course of a banking business which it was carrying on *ultra vires*. In the winding up of the society, the question arose whether the depositors were entitled to make claims upon the assets in the hands of the liquidator. The argument that the depositors were entitled at law to recover the amounts of their deposits as money had and received having failed, the question arose what rights, if any, they had against the surplus assets remaining after the creditors had been paid. While it was recognised that a person who had handed over money or property to a corporation lacking the necessary powers to enter into the transaction under which it was received was at law entitled to follow the money or property so long as it retained its identity, the difficulty arose that the money paid in by the depositors had, upon the facts, lost its identity as specific property, with the result that the depositors could not point to any specific asset the property in which lay in them. Accordingly there existed no remedy at law. However, the difficulty was overcome by applying the principle of equity under which trust moneys can be traced into an account in which they have been mingled with other moneys, the owner of the trust moneys being treated as having a charge on the blended fund. The principle was applied by treating the society and its agents who received the deposits as trustees for the depositors from the moment of receipt. I have endeavoured to summarise the reasoning of VISCOUNT HALDANE, L.C., and LORD PARKER in that case, and it does not appear to me that the principles enunciated in that case are sufficient to solve the present

problem. Those principles belong, it may be said, to the same family as do those laid down in the third line of cases, to which I will presently turn. They both illustrate the method by which equity in certain circumstances will assist a person who has no right at law but is able to show that money belonging to himself has gone to swell the assets of the person to whom, or for whose benefit, he has paid it. It is, of course, important to see that the operation of these principles is kept within proper limits, having regard to the general rule that, as was said by SIR W. B. BRETT, M.R., in *Leigh v. Dickeson* (3), at p. 65 :

... [where] money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit . . . he has no opportunity of exercising any option, and he will be under no liability.

The third line of cases is illustrated by *Bannatyne v. MacIver* (4), *Reversion Fund & Insurance Co. v. Maison Cosway, Ltd.* (5) and *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6). I take the principle applied in those cases from the judgment of ROMER, L.J., in *Bannatyne v. MacIver* (4), omitting certain words which were held by this court in the *Maison Cosway* case (5) to be unnecessary to the decision. ROMER, L.J., says, at p. 109 :

Where money is borrowed on behalf of a principal by an agent . . . though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.

This rule is not based upon the absence of borrowing powers in the principal, for it is applicable where the principal has power to borrow but the agent borrows in excess of his authority. Its application in the case of partners is discussed in LINDLEY ON PARTNERSHIP, 9th Edn., p. 258.

The real question in the present case, in my opinion, is whether or not its facts bring it within this rule. If the company had itself been indebted to the builders as sole or principal debtors, and the secretary had borrowed money from the appellant, having no authority to do so, and if the money so borrowed had been applied in payment of what was due to the builders, the case would have fallen within the language of ROMER, L.J., and the appellant would have been entitled to stand in the same position as that in which he would have been if the money had been borrowed by the company. However, the facts were not as supposed, and it is necessary to consider whether, in spite of the points of difference, the principle still applies. The first point of difference is that the money was not, strictly speaking, borrowed at all in the sense that it went into the coffers of the company. Except in the case of the first cheque, the request was for payment direct to the builders. Nevertheless, this difference is not, in my opinion, one of substance. I cannot see that it makes any difference whether the agent obtains the money himself from the lender or requests the lender to make the payment

direct to the principal's creditor. In each case, if the agent had in fact had authority, the principal would have become liable to the lender, and, if the lender is entitled to recover in the one case in spite of the absence of authority, I can see no logical reason why he should not be similarly entitled in the other. I should say here that the facts appear to me to show that the secretary (or, in the case of the first two advances, Mr. Jackson) in asking the appellant to provide the money, and the appellant in so providing it, were both acting upon the footing that the money was being provided for the company itself, in order to enable it to discharge or forestall the incidence of its liability as guarantor, and not for the subsidiary company concerned. It is true that, in the case of the first cheque for £2,000, the money was in fact received by Carlisles and used by them to pay the builders, but this, in my view, is, on the facts, a matter of form, and not one of substance.

My view that the rule in question applies to cases where the lender pays the creditor direct is, I think, supported by the decision of WRIGHT, J. (as he then was), in *Liggett's* case (6). That was a case where a bank honoured cheques drawn upon a company's account by one director alone, the signature of two directors being required by the regulations of the company. The cheques were used in payment of debts of the company, and the bank claimed to be entitled to debit the company's account, notwithstanding that the cheques were to its knowledge irregular. Upon the assumption that the company's account was in debit, each cheque would have been a request for a loan, and the case would have fallen exactly within the principle enunciated by ROMER, L.J. Upon the assumption, however, that the account was, at the time when any particular cheque was honoured, in credit, the position was different. I am not sure, if I may respectfully say so, that I agree with all the observations made by the judge in the part of his judgment which deals with the case on this assumption, but I entirely agree with the result. I should have thought that, when the bank paid the company's creditor on a cheque drawn when the account was in credit, it was doing nothing more than using its own money to pay the creditor at the request of an agent of the company who had no authority in that behalf. *Ex hypothesi* the cheque *qua* cheque did not justify the bank in debiting the company's account with the amount paid, and what WRIGHT, J., describes as a "misapplication of credits" was, so far as the cheque was concerned, completely unjustified. The debit entry appears to me to have been justified, because the bank made the payment to the creditor of the company at the request of a person purporting to act on behalf of the company in spite of the fact that to the knowledge of the bank he had no authority. However, there is a more important point of difference between the facts of the present case and those of the case assumed above. The debts which were discharged by the use of the appellant's money were not the company's debts at all. They were the debts of the subsidiaries, and the company's only liability with regard to them was that

which existed under the guarantees. The discharge of the debts, however, operated to extinguish that liability *pro tanto*, and it is not disputed upon the facts that, as I have stated earlier in this judgment, the company's assets would have been so much the less if the payments had not been made. It appears to me, therefore, that this is a case where the

A appellant's money has been used to get rid of a liability of the company, with a consequential and corresponding benefit to the company, whose assets would otherwise have been depleted. For these reasons, I am of opinion that the appellant is entitled to succeed on this branch of the case. The position would, I think, have been different if at the time of

B the payments the subsidiaries had themselves been in a position to find the money. Had this been so, no benefit would have resulted to the company from the payments, since its liability under the guarantees would never have come into effective operation. The payments would no doubt have extinguished that liability, but the benefit resulting to

C the company from such extinction would have been purely nominal.

With all respect to those who think otherwise, I do not take the view that the principle which I have been discussing applies only in cases where the creditor has been in fact paid by the hand of a person having a general authority to pay the principal's debts. There are, no doubt,

D weighty reasons which support this view, but I am unable to find that this has ever been considered to be a requirement in cases where the principle has been discussed, although there may be other cases on the subject which I have not examined. Were such a requirement essential, it would, of course, greatly limit the application of the principle. For

E instance, if a director, having no authority to borrow on behalf of his company, borrowed money from a third person, and himself applied it in payment of the company's debts, having no general authority to pay debts—and a director as such has not that authority—the third person could not recover. If, on the other hand, the director, having obtained

F the money, handed it to the company's cashier, he being a person with general authority to pay the company's debts, and the cashier used the money to pay the debts, the company would be liable. This result appears to me to be an anomalous one. Moreover, I cannot myself see how the decision in *Liggett's* case (6) could be supported, for the company's

G debts in that case were not paid by any agent of the company having authority to pay debts, but by the bank out of its own money. The sending of the cheques to the company's creditors by the director who signed them was not a payment of the company's debt at all, because the cheques, as cheques, were irregular, and it was the bank's duty to refuse

H to honour them. On the other hand, the cheques, although bad cheques, were treated as requests by the director to the bank to discharge the company's debts, and the director had no authority to make any such request. The principle is an old one. As was pointed out by ROMER, L.J., in *Bannatyne v. MacIver* (4), at p. 110, examples of its application are to be found in cases where a third person provides money

for the purpose of paying for necessaries for a married woman. In such a case, the husband was not liable at law, but he was liable in equity. An example of this is to be found in *Jenner v. Morris* (7). There LORD CAMPBELL, L.C., said, at p. 51 :

... courts of law will not recognise any privity between the husband and a person who has supplied his wife with money to purchase necessaries, or pays the tradespeople who have furnished them. Nevertheless, it has been laid down from ancient times that a court of equity will allow the party who has advanced the money which is proved to have been actually employed in paying for necessaries furnished to the deserted wife, to stand in the shoes of the tradespeople who furnished the necessaries, and to have a remedy for the amount against the husband. I do not find any technical reason given for this ; but it may possibly be that equity considers that the tradespeople have for valuable consideration assigned to the party who advanced the money the legal debt which would be due to them from the husband on furnishing the necessaries, and that, although a chose in action cannot be assigned at law, a court of equity recognises the right of the assignee.

It is to be noticed that in stating the principle LORD CAMPBELL, L.C., here refers, not only to the case where the money is actually supplied to the wife, but also to the case where the person providing the money pays the tradespeople direct. The wife had no authority to require such payment, and, although she had authority to provide herself with necessaries, and to pay for them, in the second case mentioned by LORD CAMPBELL, L.C., it was not she that made the payment at all. It is fair to observe, I think, that the precise ground upon which the equity is based has not been finally stated. It may be that it is a mere anomaly. Such anomalies are to be found at law in some cases of *quasi-contract*. The fact is that in certain respects our law did advance some way towards recognising a doctrine of unjust enrichment, but the process was stopped short, leaving certain anomalies based on ancient authority embedded in the law. It may be that this principle of equity is to be explained on the same ground. The principle, as I understand it, appears to me a beneficent one, and I should be sorry to see its application cut down in the manner suggested.

The remaining items in the claim fall into two classes. One class can be dealt with shortly. It consists of (a) a sum of £62 3s. 7d. provided by the appellant for paying a debt due from P.B.C. to the electricity company supplying Tufton Court, and (b) an item of £216 4s. 4d. provided by the appellant for paying a debt due from Carlisles to a firm of solicitors. In neither case was there any liability of the company itself, and the fact that the company indirectly obtained a benefit through the help thus given to its subsidiaries is not sufficient to give the appellant any claim against it. The other class consists of three sums, amounting together to £1,200, paid by the appellant to Carlisles in July, Aug. and Nov., 1932. The evidence with regard to these sums is incomplete, but they were treated before us as having been provided by the appellant upon the request of Mr. Antrobus in the same way as the sums dealt with in the earlier part of this judgment. Entries with regard to them appear in the appellant's ledger account. These sums were paid into Carlisles' banking account, which, as Mr. Lionel Cohen, on behalf of the liquidator,

admitted, was in debit throughout the material time. The balance sheet of the company for the year ending Mar. 31, 1932, contains a statement that the company had given an unlimited guarantee of the overdraft of Carlisles, and Mr. Lionel Cohen admitted that this guarantee had in fact been given, and was subsisting when the payments in question were made. These facts, in my opinion, bring these payments under the same principle as that which I have already held to be applicable to the payments first discussed. There is also a claim to prove for interest, but this was not pressed, and there is, in my opinion, no ground upon which it can be supported. In the result, I would allow the appeal to the extent of £17,075. However, as the majority of the members of the court have come to a different conclusion on the main question, the appeal is dismissed with costs.

SCOTT, L.J. : I have had the privilege of reading the written judgments of my colleagues, both that which SIR WILFRID GREENE, M.R., has just read and that which CLAUSON, L.J., is about to read. They differ. Sir WILFRID GREENE, M.R., would allow the appeal. CLAUSON, L.J., would dismiss it. With some diffidence, but no doubt, I agree with CLAUSON, L.J. The question for determination is whether the appellant had at the date of the winding up of the Cleadon Trust (to which I also will refer as the company) good causes of action against the company at common law, or, alternatively, in equity, for reimbursement of thirteen sums of money which he had provided out of his own pocket for the purpose of paying current debts of two subsidiary companies wholly owned by the company. SIR WILFRID GREENE, M.R., has stated the facts, and, subject to one question in regard to items 1 and 2, I concur in his view that, in ultimate analysis of the evidence, all thirteen items appear to be legally similar in circumstance. In each case, the appellant provided the money by cheque upon his bank. In the first case, the appellant's cheque was cashed by the subsidiary, who a little later paid to the creditor a slightly larger amount. In each of the other twelve cases, the cheque came to the hands of a creditor of one of the subsidiaries for that precise amount. The creditor cashed it, credited the subsidiary with the proceeds, and treated the debt as paid. The salient fact upon which the judgment of SIR WILFRID GREENE, M.R., has turned is that each debt so paid was covered by one or other of three guarantees of payment given by the company to the subsidiary's creditor, so that, had the creditor not received payment, the company could and would have been liable on its guarantee, and, as the company not only owned all the shares of each subsidiary, but also had debentures covering all its assets and to an amount exceeding their value, the company's right of recourse against the subsidiary as principal debtor was worth nothing. Whilst I agree with SIR WILFRID GREENE, M.R., in these conclusions of fact, I regard as equally important the evidence relating to the constitution and position of the company and the conduct of the

appellant at the material times. The company's articles of association provide (i) that the business of the company shall be managed by the directors, (ii) that a quorum of two is necessary "until otherwise determined," and no such determination was proved, and (iii) that the directors may appoint a managing director—there was one till Aug. 6, 1931, but I agree with SIR WILFRID GREENE, M.R., that he does not really come into the picture, except possibly on items 1 and 2, on which I will speak presently. I agree, too, with the reasons of SIR WILFRID GREENE, M.R., for deciding that art. 116 does not cure the appellant's disqualification for interest. The result is that, so far as every one of the appellant's claims is concerned, the company had only one effective director, and was thus deprived of the possibility of a quorum, from which flows the legal corollary that, in any matter in which action by the company—that is, by the *juridical persona*—was necessary, it could not act at all. It was still the outer shell of a *persona*, but it was paralysed, and could neither request nor agree nor instruct nor authorise. In short, it could not do anything within the sphere of management of the company's business. It was the negation of a real person, except, I suppose, in regard to ownership of its property and routine action by servants, and, of course, transactions outside the vitiating reach of the appellant's disqualification. In so far as it is material, the same elementary presumably applies to each of the two subsidiaries.

The three companies all had the same office, and Mr. Antrobus was secretary of all three. There was no evidence of his being given any managerial powers. He remained a mere secretary, so far as his authority and duties were concerned. He therefore had no power (a) to make any request on behalf of the company for a loan to itself or an advance to a third party, (b) to make any such agreement for the company, (c) to record the transactions in the company's books as loans to the company, (d) to indorse the company's name on the cheque in the case of item No. 1, drawn in favour of the company, or (e) to send on that cheque, or any of the appellant's other cheques, however drawn, to a subsidiary company, or to that company's creditor. It is further to be observed that, when Mr. Antrobus did any of the things he did in connection with the advances, there is nothing in the evidence to show that he was either intending or professing to act for the holding company rather than for the subsidiary, and, in the absence of such evidence, I think the burden of proof resting on the appellant that Mr. Antrobus even purported to act for the company rather than for the subsidiary—for example, in sending on the cheques—remains undischarged. If such proof was a material element in the appellant's cause of action, the judge was necessarily right in dismissing his claim.

The appellant held the controlling interest in the company, and, in my view, it is apparent from the evidence that he exercised a dominant control in the administration of the affairs of the company, and also of its two subsidiaries, practically to the extent of treating the

businesses of the company and its two subsidiaries as one business belonging to himself. I think that it is a proper inference from the evidence that the various advances (other than the first two, which were arranged with Mr. Jackson) were arranged exclusively between himself and Mr. Antrobus, the secretary of all three companies. Mr. Kelly, his co-director, is said to have had knowledge of some, or of all, of the transactions, but the effect of the evidence on my mind is that the appellant looked to Antrobus to tell him what money was needed for the subsidiaries, that he then obtained such further information as he thought fit from Antrobus, and, upon that, decided what advances he considered it desirable to make, and directed Antrobus to deal with the cheques accordingly, and to record the advances in the company's ledger as loans by himself to the company.

In at least one aspect, it is relevant also to draw attention to the legal irregularity of the course of conduct followed by the appellant himself in relation both to the Cleadon Trust and, presumably, to the subsidiaries. It is obvious that throughout the whole thirteen transactions he was flagrantly disregarding the provision of the Companies Act and of the articles of association which entrusted the whole management of the company's business to the directors, acting through a *quorum* of two. He was also guilty of interfering improperly and without authority with the secretary, and of giving him orders which he had no right to give. The privilege of limited liability which Parliament has given to members of companies registered under the Companies Acts is given upon the footing of conditions the observance of which by directors is of general importance to the public, especially in these one-man or two-men small private companies, where the absence of publicity makes due compliance with the law all the more important. It is Mr. Evershed's common law submission which makes the appellant's conduct relevant. That submission is that the appellant is entitled to succeed because repayment was in "fairness and justice" due to him, that being the principle, Mr. Evershed contends, which is embodied in the class of common law causes of action known as contracts implied by law, on which he relies. If that principle, or anything like it, could be established as law to-day, the conduct of the appellant would be germane to the inquiry, in that it might well be regarded as neither "fair nor just" for the court to reward such misconduct by extending its help. However, apart from these considerations, both of the appellant's grounds of claim—namely, common law and equity—are affected by two fundamental conclusions of fact to be drawn from the evidence : (i) that the company as a *juridical persona* took no action whatsoever ; it could take none and was therefore wholly impassive ; and (ii) that the appellant's advances, so far as the company was concerned, were purely voluntary and gratuitous.

In spite of the fact that all three members of this court are in agreement that the claim at law is bad, I think that Mr. Evershed is entitled to some statement of our reasons, so I will give mine shortly. In his

argument upon the common law aspect, he did not distinguish between the two senses of the legal phrase "implied contracts"—namely, (a) a real consensual contract inferred as a conclusion of fact from the conduct of the parties and other circumstances of the case, though not expressed in words written or spoken, and (b) the so-called "contract implied in law," where there is no agreement in fact, but none the less a right of action, evolved by the common law courts on so-called equitable principles at a time when they had no equitable jurisdiction. These are the "implied contracts" explained so clearly in *LEAKE ON CONTRACT*, 1st Edn., in 1867, and in *BULLEN AND LEAKE ON CONTRACTS*, 3rd Edn., in 1868. In these latter causes of action, there was no consensual element whatever, although the *indebitatus* count for "money paid at request," which lay where a real request could be inferred, was also used in the permitted types of claim for money paid, where there was no possibility of any request in fact. Whether or not Mr. Evershed intended to keep (a) and (b) separate I am not sure, but it is obviously impossible, for the reasons already stated by SIR WILFRID GREENE, M.R., that a consensual contract within class (a) should be inferred by the court from the facts of the present case. Neither "request" nor "acquiescence" can be found as a fact on the part of the company. Having no quorum of directors, it could have neither will, nor intention, nor choice, and it could not acquiesce any more than it could dissent or protest. It follows that class (a) of implied contracts, the consensual kind, is ruled out.

Mr. Evershed relied for authority on a passage in *SMITH'S LEADING CASES*, 13th Edn., p. 156 :

But if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done.

This passage must, I think, be regarded as relating solely to contracts implied in fact, and not as touching contracts implied in law. The distinction was emphasised by BAYLEY, B., in *Paynter v. Williams* (8), at p. 820, the second of the two authorities cited in *SMITH'S LEADING CASES* in support of the text. The other case cited is *Falcke v. Scottish Imperial Insurance Co.* (9), where the court refused to draw the inference of any actual contract. BOWEN, L.J., pointed out, at pp. 249, 250, that knowledge was not of itself enough, and explained the limits of such an inference. However, I do not think that Mr. Evershed was seriously contending for a contract implied in fact. I understood him to rely really on the semi-equitable doctrine of the contract implied in law, for it is to this class of action alone that the passage he read to us from *LEAKE ON CONTRACTS*, 8th Edn., relates. It includes the following sentences, at p. 44 :

The transactions which give rise to contracts of this kind [contracts implied in law] may be described generally as importing that some undue pecuniary inequality exists in the one party relatively to the other, which the law recognises as requiring compensation upon equitable principles ; and the law not only imposes

a debt, but further implies a promise to pay the debt. . . . The promise here implied is, however, a fiction of law, and therefore requires to be distinguished from the implied promises already mentioned, in which the promise is an implication or inference of fact.

This language is almost identical with that of the first edition, published in 1867, which is the *locus classicus* of exposition upon that interesting, though small, branch of our common law, and is undoubtedly good law as applied to the cases there cited. Mr. Evershed boldly submitted that the appellant's case fell exactly within it, and that, accordingly, he was entitled to his action at law "upon equitable principles." It is plain that the appellant's case does not fall directly within any one of the various types into which common law actions for money paid, as illustrated by the decided cases, were divided in LEAKE ON CONTRACTS; 1st Edn., pp. 40-46, a classification repeated in subsequent editions. Nevertheless, Mr. Evershed contended, with at least sufficient insistence to keep the argument open in the House of Lords, that the present is a case covered by the principle of fairness and justice indicated in Leake's statement as the basis of the common law action—something akin to, though not identical with, the continental doctrine of unjust enrichment. I therefore feel that the appellant is entitled to a reasoned decision upon it, however shortly explained.

As the law stands to-day, it is no doubt difficult to formulate any one principle which will unify all the recognised types of common law actions upon contracts implied in law, or even upon the actions for money paid. It may even be the right view, as LORD SUMNER rather suggested in *Sinclair v. Brougham* (2), at p. 452, that all these old common law causes of action are to be regarded as no more than curious survivals of past legal history, stereotyped within the rigid boundaries of the particular facts of the decided cases, but resting on no general principle capable of wider application. There has, however, been a good deal of discussion recently on the subject of jurists—for example, WINFIELD'S PROVINCE OF THE LAW OF TORT, 1931, pp. 167-176, WINFIELD'S LAW OF TORT, 1937, pp. 697-700, JACKSON ON THE HISTORY OF QUASI-CONTRACT, 1936, and the LAW QUARTERLY REVIEW since 1936—and I for one should be sorry to think that the common law is condemned out of hand to no further growth in this field. The fact that little development has occurred since the 'sixties of last century may well be an indirect result of the amalgamation of common law and equity under the Judicature Acts. As the common law judges had so often spoken of "equitable principles" in cases of "contracts implied in law," it was only natural that, when they became entitled to apply equity, they should resort to it for the solution of new cases not directly covered by existing decisions at law. Whatever the explanation, however, it is clearly impossible to-day to accept Mr. Evershed's submission that the common law recognises any rule of justice and fairness *prima facie* applicable to the present case.

In any event, there are two further answers to his common law claim.

The facts of the case bring it exactly within the excluding rule about voluntary payments in *LEAKE ON CONTRACTS*, 8th Edn., p. 46 :

A voluntary payment of the debt of another, without request, and under no legal liability or compulsion, gives no claim for the money paid against the person whose debt is discharged.

The leading authority quoted on that page of the first edition was *Exall v. Partridge* (10), which was cited for the same purpose by WRIGHT, J., in *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6), at p. 60. The second answer is the same as that which CLAUSON, L.J., and I make to the claim in equity—namely, that, in the circumstances of the present case, the company never had anything whatever to do with any of the transactions. It was a mere semblance of a company, which neither could nor did take any action. That fact is the reason why I find myself in respectful disagreement with SIR WILFRID GREENE, M.R., in regard to the appellant's claim in equity. It cannot, in my opinion, be said that the company used his money when it did not (because it could not) take any action whatsoever in relation to the advances. Antrobus, the secretary of all three companies, no doubt received the cheques and sent them to the creditor concerned, but, Cleadon Trust, Ltd., itself did nothing at all. It never received the cheques, never handled them, never handed them to the subsidiaries, and never used the advances. In particular, it never decided to forestall its liabilities as guarantor. It did not do these things because, in the state of legal paralysis in which it was, it had no mind, and could not do any one of these things, the legal reason being that they were all matters appertaining to the management of the company, and requiring a decision of the board. I wholly agree with CLAUSON, L.J., that it is this feature which distinguishes the present case from *Bannatyne v. MacIver* (4), *Reversion Fund & Insurance Co. v. Maison Cosway, Ltd.* (5) and *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6). In each of those cases, the party held liable had taken action—whether personally or by an authorised agent does not matter—to use the money advanced. In *Bannatyne's* case (4), the agent Hudson, who borrowed the money without authority (because contrary to express instructions), was acting within his authority as manager in paying the firm's debts with it. This fact was cardinal, because it meant that the firm itself took action and used the plaintiff's money for its own purposes, conscious, because of the knowledge it had through its agent, that it was the plaintiff's money. It was for that reason that the court there thought it unconscionable for the firm which had so used the money not to repay it, and to that extent held that the lender had an equitable right to recover.

In his judgment just delivered, SIR WILFRID GREENE, M.R., relies particularly on the formulation of the equity by ROMER, L.J., in *Bannatyne's* case (4), at p. 109 :

Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been

authorised, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.

- In that sentence, ROMER, L.J., was referring to the fact that Hudson, the manager, although forbidden to borrow, had general authority to pay the firm's debts, and therefore he held that, to the extent that he so paid debts, the firm itself was using the advances obtained. That was a case of natural persons, not a company, and ROMER, L.J., himself drew attention, at p. 109, to the possible materiality in such questions of the difference between a natural person and a company. As an illustration of the difference, he referred to the case of a wife, under the old *régime* of husband and wife, borrowing money to pay for necessities, to which SIR WILFRID GREENE, M.R., has referred. If the wife had money of her husband's in her hands, she was entitled as of right to use it to pay for her necessities, whether still to be or already purchased by her, and there can be no doubt that, when she so used borrowed money, it was her own act in fact, and nobody else's. Yet if it was her act in fact, it was in law her husband's act, for in her hands it was his money, and, in using it to pay for the necessities upon which he was legally bound to spend his money, she was acting as his agent. Also, he it noted that, in the case where ROMER, L.J., was giving judgment, the payment of the firm's debts by the manager, Hudson, was a payment on behalf of the firm, with the firm's full authority. In the present case, it is just that complete absence of action by the company in regard to any utilisation of the appellant's advances that makes the analogy between it and *Bannatyne's* case (4) break down. It cannot be said that Cleadon Trust used the appellant's advances, for it was paralysed. The next case cited by SIR WILFRID GREENE, M.R., *Reversion Fund & Insurance Co. v. Maison Cosway, Ltd.* (5), was similar to *Bannatyne v. MacIver* (4), with one apparent and one real difference in the facts. The person from whom repayment was claimed was a company registered under the Companies Acts, and not a natural person, but this was not a real difference, because the company had a managing director, with full authority to pay the firm's debts, who did use the plaintiff's money to pay the company's debts. That is what I call the apparent difference. The real difference is that the lender knew that the managing director to whom he lent the money had no authority from the company, but, having regard to the fact that the company itself used the lender's money, the court held that the plaintiff's equity nevertheless attached.

I regard these two decisions as the most important for the purpose of understanding the equity in question, and, therefore, have endeavoured to explain shortly just why I think them important. The same feature, however, was, I think, present in *Liggett's* case (6). The "discharge" of the company's debts, to which WRIGHT, J. (as he then was), refers,

at p. 68, must be taken to have been made under Liggett's authority to pay current debts when he had money of the firm's out of which to pay them. However, we shall hear in a moment or two from CLAUSON, L.J., a very careful, though concise, analysis of all the relevant cases, and I agree with it, and with his comments and conclusions, so entirely that it is both unnecessary and undesirable for me to add any further reflections of my own. A

The separate question in regard to items 1 and 2 which I reserved at the outset for subsequent mention is whether the fact that Mr. Jackson did not relinquish his post of managing director till Aug. 6, 1931—that is, after the date of the second advance—makes any difference to those two items. I have considered the appellant's evidence carefully, and cannot see that he gave any evidence which would justify any such conclusion. I may add that I agree with what CLAUSON, L.J., says in his judgment about this point. Accordingly, I say no more, except that I am glad to think that this court is not extending its help to a director who seems to me to have used the company's business as if he owned it, and to have disregarded very important statutory provisions for its proper management. In the result, I think that the judgment of BENNETT, J., was right and should be affirmed, and that the appeal should be dismissed with costs. B C D

CLAUSON, L.J.: This is an appeal from an order of BENNETT, J., refusing an application of Mr. Creighton for the reversal of a decision of the liquidator of Cleadon Trust, Ltd., in so far as he rejected a claim by the applicant to be allowed to rank as a creditor for the sum of £18,254 7s. 3d. According to the facts as found by the judge, the secretary of the company, wholly without authority, procured Creighton to provide this money and to pay it to persons who were entitled to the payment of the moneys from a subsidiary company. The company had given guarantees to the payees, and the effect of the provision of the money was that the debt so guaranteed was discharged, and, in consequence, at the date of the liquidation the guarantee had ceased to be operative. E F

It was argued for Mr. Creighton, in the first place, that the secretary's request must be treated in the circumstances as the request of the company, and that Mr. Creighton was accordingly entitled at the date of liquidation to rank as a creditor of the company for the sum in question as for money paid at the company's request. This argument was rejected by BENNETT, J. I can see no flaw in the reasoning of BENNETT, J., and I am prepared on this point to adopt his judgment as my own. G H

It was argued for Mr. Creighton in the second place, on the footing that there was no request by the company, that the law would imply a request, and, therefore, an obligation, to repay, from the facts (i) that the payments made by Creighton were made by him in expectation of

the repayment, (ii) that the company in the circumstances knew of this fact, and acquiesced in it, and (iii) that the company derived substantial benefit from the payments. Again I can find no flaw in the judge's reasons for rejecting this argument, and I am prepared on this point, as on the preceding point, to adopt his judgment as
A my own.

It was next argued that (a) a resolution of the directors passed on Dec. 5, 1932, and (b) the presentation of certain accounts to the shareholders, had the effect of validating Mr. Creighton's claims. The judge rejected this argument. I agree with the reasons he states, and I find
B it unnecessary to add anything to his judgment on this head. On this part of the case, I would only add two observations. The first is this. The case was argued before BENNETT, J., on the footing that no cash was received by the company in respect of the sums for which Mr. Creighton sought to prove. In this court, it was suggested that one of
C the sums was provided by a cheque drawn on Creighton's banking account in favour of the company, indorsed by the secretary, and handed on to a party who drew the money from Creighton's bank and with it paid the ultimate creditor. It was suggested that, on these facts, the company ought to have been treated as having received the sum in
D question and passed it on to a party who cashed the cheque. It was not, however, shown that the secretary had any authority either to act for the company in taking the cheque or to act for the company in indorsing it. It appears to me that the sum in question cannot be treated as having reached the company by reason merely of the company's name appearing as payee on the cheque. BENNETT, J.,
E was, in my view, right in treating the case as one in which no cash came to the company's hands in respect of the sums in question. The second observation is this. It appears that Mr. William Jackson was not only a director but also, apparently until Aug. 6, 1931, managing director.
F The first two of the items in respect of which Mr. Creighton claimed to prove were paid by him at a date falling within the period during which Mr. Jackson was managing director. Had there been evidence that Mr. Jackson was privy to the provision of these sums, or to their application, a different complexion might have been put upon the
G matter, in view of the authorities which recognise a *prima facie* power in a managing director to bind the company. It was, however, not suggested in argument before this court, nor does there appear to be any evidence, that Jackson took any part either in procuring the provision of these sums by Mr. Creighton or in their application.
H Accordingly, these items fall to be treated in precisely the same way as do the items provided by Mr. Creighton at a period when there was no managing director.

There remains, however, a further point which, whether or not it was argued below, was put forward in this court as a ground for reversing the judgment of BENNETT, J. It was alleged that the payment of the

money provided by Mr. Creighton—or, at all events, of the bulk of it—resulted either (a) in the company being relieved of a liability under their guarantee for a like amount, or (b) in an asset being preserved to the subsidiary company by means of the payment, with the result that certain debentures of the subsidiary company held by the company came to be of a value greater, either by the amount of the sum so paid or at all events by a very substantial sum, than the value which they would have borne had the sum in question not been paid. It was said to be contrary to the principles of equity as administered in this court that the company should be allowed to retain any such benefit except on the terms of reimbursing to Mr. Creighton the sum paid by him which had resulted in the company obtaining the benefit. It is to be borne in mind that, upon the facts of this case, there was no request by the company that the payment in question should be made, and that the payment was not made by any person who had authority from the company either to make the particular payment or generally to make payments, in respect of the company's liabilities, on the company's behalf, nor was it made out of moneys in the company's possession or under the company's control. The equity to be enforced against the company must, accordingly, as it would seem, arise from the fact that strangers, out of moneys which are not the company's moneys, or treated by the company or any person having authority from the company as the company's moneys, have made payments which have benefited the company. The equity would, accordingly, appear to be founded on the mere fact that an unsought benefit has been conferred on the company. Since the decision in this court in *Falcke v. Scottish Imperial Insurance Co.* (9), it is, I conceive, not open to this court to hold that a person who, by paying money, confers an unsought benefit on another thereby entitles himself to an equitable right of recoupment as against that other. As BOWEN, L.J., said in that case, the general principle is beyond all question that work and labour done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit upon a man against his will. Some earlier observations on this topic by SIR W. B. BRETT, M.R., in *Leigh v. Dickeson* (3), at p. 65, are entirely in accord with the statement of the law by BOWEN, L.J. It was argued, however, that there was to be deduced from certain reported cases an equitable doctrine to the effect, as I understood the argument, that a person who has in fact paid the debts of another without authority is entitled to recoupment as against that other. Such a doctrine would seem to be inconsistent with the decision of this court in *Falcke v. Scottish Imperial Insurance Co.* (9), and on that ground alone it would not seem open to this court to accept it. However, it may nevertheless be desirable to consider whether the cases

in question recognise any such doctrine. The earlier cases cited in support of the doctrine were *Re Cork & Youghal Ry. Co.* (1), *Reid v. Rigby & Co.* (11), *Bannatyne v. MacIver* (4), and *Reversion Fund & Insurance Co. v. Maison Cosway, Ltd.* (5). From those decisions there is to be deduced a clear equitable principle which I will venture to state as follows. Let it be assumed that A. requests B. to advance money to C., A. being a person who has no authority from C. to make the request (whether because C. is a company whose powers are limited in such a way as to make it *ultra vires* on C.'s part to make such a request or whether because A., though professing to act as C.'s authorised agent to make the request, has in fact no such authority). Let it be further assumed that B., in response to the request, in fact places the money under the control of C. or C.'s agents, and C., or an agent authorised by C. to pay off C.'s debts, uses the money, or procures the money to be used, in or towards discharge of C.'s debts. On these assumed facts, a court of equity will treat B. as entitled to be recouped by C. a sum equal to the amount so used in or towards discharging C.'s debts. In *Re Cork & Youghal Ry. Co.* (1), the directors of the company occupied the position of A., the holders of the Lloyds' bonds occupied the position of B., and the company occupied the position of C. The moneys advanced by the bondholders came under the control of the company, C., and were applied by the directors in paying off the company's legitimate debts, it being within their authority as directors to pay off those debts. In *Reid v. Rigby & Co.* (11), Allport occupied the position of A., Reid occupied the position of B., and Rigby & Co. occupied the position of C. The money was paid into the banking account of Rigby & Co. (C.), and was applied by Allport, as manager for Rigby & Co., in paying off Rigby & Co.'s debts, it being within his authority to pay off those debts. In *Bannatyne v. MacIver* (4), Hudson occupied the position of A., Bannatyne occupied the position of B., and the firm of MacIver occupied the position of C. The moneys advanced by Bannatyne were paid into MacIver's bank account, and were applied by Hudson in paying the legitimate debts of the branch of MacIver's of which he was the manager, it being within his authority as such manager to pay off those debts. In *Reversion Fund & Insurance Co. v. Maison Cosway, Ltd.* (5), Morhange occupied the position of A., the Reversion Fund & Insurance Co. occupied the position of B., and Maison Cosway, Ltd., occupied the position of C. The moneys advanced by the Reversion Fund & Insurance Co. were paid to Morhange, and were applied by him in paying legitimate debts of Maison Cosway, Ltd., which it would be within his authority as managing director of Maison Cosway, Ltd., to pay.

It is to be observed that the equity cannot operate against C. (the company or the principal) merely because C. has in fact received a benefit from B.'s action in providing the money. That fact alone, as *Falcke's case* (9) has settled (so far as this court is concerned), will not set up an equity against C. The equity must, it would seem, arise from

the fact that C., by himself or by a person authorised to act, in the matter of payment of C.'s debts, for C., has used the money so as to obtain a benefit for C. The benefit has not been an unsought benefit conferred on C. behind his back. It is a benefit which C. has obtained for himself by using (either himself or by his agent) A.'s money as his own. It is his conduct in so using A.'s money which makes it uncon- A
 scientious that he should retain the benefit while refusing recognition of A.'s just claim to recoupment. As LORD SUMNER pointed out in *Sinclair v. Brougham* (2), at p. 456, there is now no ground left for suggesting as a recognisable "equity" the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded B
 to the payee. However, there is no difficulty in recognising and enforcing against a man who has, by himself or his agent, used another's money to pay his own debt an equity to refund to that other a sum equal to the money of that other which he has treated as his own. In *Bannatyne v. MacIver* (4), ROMER, L.J., refers, at p. 110, to the cases in which a C
 husband has been held liable in equity to recoup to a *quasi*-lender money applied in payment of necessities for the wife. In *Jenner v. Morris* (7), which no doubt is one of the cases which ROMER, L.J., had in mind, the decision on the facts of the case seems to come within the principle as I have endeavoured to state it, since, as appears from the answer as D
 stated at p. 45, the wife's brother had paid money to the wife for her maintenance and support, which moneys had been actually laid out in the purchase of necessities for her. The wife was, of course, the husband's agent to apply his money in payment for her necessities. The inquiry which had been directed by KINDERSLEY, V.-C., and was upheld E
 by LORD CAMPBELL, L.C., was directed to ascertaining what moneys the claimant had paid to or on account of the wife for the purpose of providing her with necessities. It is true, no doubt, that in these cases the judges do not draw specific attention to the fact that in each case the money was expended in paying the *quasi*-borrower's debts by or F
 with the privity of a person who had authority to use the *quasi*-borrower's money in paying the *quasi*-borrower's debts. Nevertheless, as the facts in each case stood, the limited principle which I have stated suffices to justify the decisions without infringing the principle recognised in *Falcke v. Scottish Imperial Insurance Co.* (9). Since the facts did not necessitate G
 the consideration by the courts of any wider principle, I confess that it does not seem to me to be open to this court to deduce a wider principle from those decisions if (as I venture to think) the wider principle would, if established, infringe the principle recognised in *Falcke v. Scottish Imperial Insurance Co.* (9). H

The next in order of date of the cases cited is *Underwood (A. L.), Ltd. v. Bank of Liverpool* (12). In that case, Underwood (for all the purposes material to the matter now in question) occupied the position of A., the bank occupied the position of B., and the plaintiffs, Underwood, Ltd., occupied the position of C. An inquiry into the facts was directed in

order to ascertain whether money of Underwood, Ltd., which had found its way into the hands of the bank (B.) had been used to pay legitimate debts of Underwood, Ltd. (C.), and it was authoritatively suggested, though not perhaps finally decided, that *Bannatyne v. MacIver* (4) and *Reid v. Rigby & Co.* (11) were authorities for the view that the bank were to be treated in regard to those moneys as being in the same position as that in which they would have been if they had provided the money upon a request made by an authorised person on behalf of Underwood, Ltd., and the money had been paid out in meeting legitimate debts of Underwood, Ltd. That would, in my view, have been perfectly correct, on the principle which I have formulated above, if the debts were paid out of the money either by Underwood, Ltd., or by some person authorised by Underwood, Ltd., to pay them. As I read the report (see p. 794), the inquiry was directed on the assumption that it could be established that Underwood had authority as between himself and the company to pay those debts. If that be (as I venture to think it is) the right view of the decision, it would appear neither to contradict nor to go beyond the principle which I have formulated above as the principle to be deduced from the earlier cases. I venture to doubt whether SCRUTTON, L.J., when he referred to the "equitable doctrines under which a person who had in fact paid the debts of another without authority was allowed the advantage of his payment," intended to express his adoption of any principle beyond that which can be deduced from the cases which he cites—namely, *Bannatyne v. MacIver* (4) and *Reid v. Rigby & Co.* (11). If the view I have indicated above of those two cases be correct, the matter would have been quite correctly stated if SCRUTTON, L.J., had used the phrase "equitable doctrines under which a person who had without authority provided money which in fact was used, by a person having authority so to do, to pay the debts of another was allowed the advantage of the payment." So stated, the doctrine would have fully justified the form of inquiry ordered, which was directed to ascertaining the circumstances in which the debts were paid. It is not, I venture to think, a fair reading of the few relevant lines in the judgment of SCRUTTON, L.J., to treat them as intended to lay down any equitable principle which could not be deduced from the cases which he cites of *Bannatyne v. MacIver* (4) and *Reid v. Rigby & Co.* (11).

In the next case, *Liggett (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.* (6), Liggett occupied the position of A., and, without authority from Liggett, Ltd., C., procured Barclays Bank, B., to provide money which was used by Liggett, who was carrying on the business, and could not carry it on without paying the legitimate debts of Liggett, Ltd., in due course of business, to pay those legitimate debts. If the view of the previous authorities which I have indicated above be correct, it follows that the bank were entitled to debit Liggett, Ltd., with a sum equal to the amount of the legitimate debts of Liggett, Ltd., so paid out of the money provided by the bank, provided only that it appeared that Liggett had

authority as between himself and Liggett, Ltd., to pay the debts. I should have thought that there was, on the facts, strong ground for holding that Liggett, Ltd., though they could repudiate the cheques signed by Liggett, could not repudiate Liggett's authority to pay their legitimate debts, since he was conducting the business and the company received the goods so paid for, goods supplied for the purposes of the business, goods for the payment of which the company were held by the judge, at p. 59, to be liable. If, then, Liggett had authority to pay the company's debts, the principle as I have stated it above amply justified the result of the case—namely, the establishment of the liability of Liggett, Ltd., to give the bank credit for sums paid on cheques drawn by Liggett for sums which in fact were used to pay the debts of Liggett, Ltd. The case was the mere case of an obtaining by Liggett on the company's behalf, but without authority, of moneys which, within his authority as conductor of the business, he used to pay the company's legitimate debts. It must, however, be admitted that the judge seems to treat the case as one in which the difficulty was that Liggett had no authority to pay the company's debts, whereas in my view the difficulty arose, not from any absence of authority in Liggett to pay the company's debts, it being, in my view (and I venture to think also in the judge's view), his duty as conducting the business to pay them, but from the absence of authority in Liggett to procure the necessary funds on the company's behalf, and so to impose on the company direct liability as a debtor.

With the greatest respect for SCRUTTON, L.J., and for WRIGHT, J., I cannot persuade myself that this court would be justified by anything in the reports of the two last-mentioned cases in extending the principle as established in this court in the earlier cases so as to cover, not only a case where the money provided has been expended by the *quasi*-borrower or by an agent authorised by him to pay his legitimate debts, but also a case of the money being expended by an outsider with no authority, direct or indirect, to pay the *quasi*-borrower's debts. In *Lloyds Bank v. Chartered Bank of India, Australia & China* (13), reference was made to *Bannatyne v. MacIver* (4), but, on the facts (see pp. 63, 75, 79), the question of the applicability of the principle recognised in that case did not arise, and the content of the principle was not discussed. *Re Airedale Co-operative Worsted Manufacturing Society, Ltd.* (14) was referred to, but it was a simple case of the application by the authorised officers of the *quasi*-borrowing society of the money borrowed in discharging the legitimate debts of the society, and it throws no light on the point in question in the present case.

In my judgment, it results, from a survey of the cases upon which the appellants sought to establish the equity on which they rely, that there can be deduced from them no principle which enables this court to hold that the mere fact that Mr. Creighton made payments which enured to the benefit of the company established an equity in his favour against

the company to have recoupment from their funds. In my opinion, the appeal should accordingly fail, and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *T. D. Jones & Co.* (for the appellant); *Bentleys, Stokes & Louless* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

ODHAMS PRESS, LTD. v. COOK.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.J.J.),
May 23, 24, November 21, 22, 23, 1938.]

Income Tax—Deductions—Subsidiary company—Trading account between principal and subsidiary company—Loss of subsidiary company written off trading account—Whether money wholly laid out for trade of principal company—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 3 (a), (e), (f), (i).

The appellant company had a number of wholly controlled subsidiaries for which it did printing work. One of these companies, C.F., Ltd., during the year 1933-34 made a loss upon its trading operations of £2,927. The charge for printing during that year was £10,118, and the appellant company wrote off £2,927 from that sum and contended that that sum of £2,927 was a proper deduction against profits. The Crown contended that the sum of £2,927 had no specific relation to the sum of £10,118 and that it was in fact capital put into the subsidiary company to support it:—

HELD: the sum of £2,927 was capital put into the subsidiary company to support it, and was not wholly laid out for the purpose of the appellant company's trade. It fell, therefore, within the prohibitions of Sched. D, Cases I and II, r. 3 (a), (e), (f), (i).

Decision of LAWRENCE, J. ([1938] 2 All E.R. 312) affirmed.

[EDITORIAL NOTE.] It was contended that the payment here in question was similar in its nature to the payment made by brewers in acquiring property to be let as tied houses. Unfortunately for this contention, there was a finding of fact in *Usher's* case (1) that the premises were acquired solely in the course of, and for the purposes of, the brewers' trade. There was no such finding here, and upon this the contention failed. The securing of printing orders for the appellants was said to be only one of the considerations upon which they founded and supported the subsidiary company.

AS TO CAPITAL SUMS ADVANCED TO SUBSIDIARY COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 160, 161, para. 327; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 242-252.]

Cases referred to:

- (1) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 28 Digest 56, 287; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *revsg.*, [1914] 2 K.B. 891.
- (2) *Reid's Brewery Co. v. Male*, [1891] 2 Q.B. 1; 28 Digest 56, 285; 60 L.J.Q.B. 340; 64 L.T. 294; 3 Tax Cas. 279.
- (3) *Noble (B. W.), Ltd. v. Mitchell* (1926), 43 T.L.R. 102; Digest Supp.; 11 Tax Cas. 372.
- (4) *Union Cold Storage Co., Ltd. v. Jones* (1923), 129 L.T. 512; 28 Digest 53, 270; 8 Tax Cas. 725.
- (5) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 28 Digest 57, 290; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215.

- (6) *Addie (Robert) & Sons' Collieries, Ltd. v. Inland Revenue Comrs.*, [1924] S.C. 231; Digest Supp.; 8 Tax Cas. 671.
- (7) *Hagart & Burn-Murdoch v. Inland Revenue Comrs.*, [1929] A.C. 386; Digest Supp.; 98 L.J.P.C. 113; 141 L.T. 97; 14 Tax Cas. 433.
- (8) *English Crown Spelter Co., Ltd. v. Baker* (1908), 99 L.T. 353; 28 Digest 48, 250; 5 Tax Cas. 327.
- (9) *Inland Revenue Comrs. v. Huntley & Palmers, Ltd.* (1928), 12 Tax Cas. 1209. A
- (10) *Marsden (Charles) & Sons, Ltd. v. Inland Revenue Comrs.* (1919), 12 Tax Cas. 217.
- (11) *Baker v. Mabie Todd & Co., Ltd.* (1927), 13 Tax Cas. 235; Digest Supp.
- (12) *Morley v. Lawford & Co.* (1928), 140 L.T. 125; Digest Supp.; 14 Tax Cas. 229. B
- (13) *Moore v. Stewarts & Lloyds, Ltd.* (1906), 6 Tax Cas. 501; 28 Digest 50, case r.

APPEAL from a decision of LAWRENCE, J., dated Mar. 25, 1938, and reported [1938] 2 All E.R. 312, on an appeal by case stated from the Special Commissioners. The facts are fully set out in the judgment. C

J. Millard Tucker, K.C., and *Frederick Grant* for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondent.

Tucker, K.C.: A sum paid to preserve an interest in a subsidiary company is a charge on revenue. All money spent for the maintenance of capital assets is revenue expenditure, unless it is an expense which is forbidden by Sched. D, Cases I and II, r. 3. The nature of the amount allowed to the subsidiary was not affected in any way by the method by which it was arrived at. In the present case, the commissioner has said that he was of opinion that the sum was written off by the appellants to enable the subsidiary company to continue its business. That is a finding in the appellants' favour. In the absence of a strict prohibition contained in the rules, the profit of trading must be found according to ordinary commercial principles. If the payment has anything to do with the maintenance of the investment made by the appellants in the subsidiary company, it stands on the same footing as do repairs to a factory. The commissioner has completely misunderstood what was expected of him by the second question. The method by which a particular figure is arrived at cannot determine whether it is a capital or a revenue expenditure. The question as to whether the sum was released or was still owing was not submitted to the commissioner. The case must now be argued on the footing that the appellants have forgone the sum in question. On the facts of this case, it cannot be a capital sum. The appellants, for the purpose of increasing their work, acquired a controlling interest in other businesses. This is a similar case to *Reid's Brewery Co. v. Male* (2), where the brewery company, as an adjunct to their business, advanced money to customers. The original charge was provisional. The writing off was a final act. [Counsel referred to *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1), *Noble (B. W.), Ltd. v. Mitchell* (3) and *Union Cold Storage Co., Ltd. v. Jones* (4).] D
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- Grant* : The making of the allowance benefited the subsidiary, but, if the object of making it was to benefit the appellants' own business, the case falls within the decision in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1), and the amount ought to be allowed. The point is whether or not it was a prudent thing to do from the point of view of the appellants' own business, and in that case it could not be suggested that it was not a proper expense. There is no evidence to support the finding of the commissioner stated in para. 2. As regards the capital point, the commissioner has not answered the right question. He has stated no facts to support the conclusion that this sum was a loss of capital.
- A** *The Attorney-General* : It is plain, upon the evidence, that it is to the interest of Odhams Press, Ltd., that the subsidiary companies shall carry on and make a profit, and shall be able to pay the printers' bills made out on trade charges. The commissioner has said that Odhams Press, Ltd., wrote off the amount in question in order to enable Coming Fashions, Ltd., to carry on their business as compilers and vendors of this periodical. Therefore, the sum was not written off solely and exclusively for the business of the appellants. That is a perfectly clear finding. In order to determine that a sum cannot be deducted, it is not necessary to show that there has been a loss of capital. The amount of this loss was not incurred
- B** during the year, but was determined by the amount of the indebtedness of Coming Fashions, Ltd., and it was a voluntary reduction of their credit balance by Odhams Press, Ltd. The amount formed part of the capital employed in the business of the appellants. By his finding, the commissioner is saying that the amount in question was determined
- C** solely by the amount due by Coming Fashions, Ltd. That is, it was not determined by the relationship of customer and supplier, but by the financial position of Coming Fashions, Ltd., as an independent entity carrying on their own trade. There are numerous authorities which deal with this question. The words "wholly and exclusively" are
- D** words I particularly emphasise, but it is also important to bear in mind the words "for the purposes of the trade." It is on these words particularly that the authorities have taken out of r. 3 (a) payments which might ordinarily be thought to be within it. The trade for this purpose is the trade which is being carried on from year to year : *Strong & Co., Ltd. v. Woodfield* (5). It has been laid down that, if what was attempted was really the acquisition of something for the purpose of one's trade, that was not a proper deduction, as in *Robert Addie & Sons' Collieries, Ltd. v. Inland Revenue Comrs.* (6). The other line of cases shows that an expenditure cannot be deducted if it is incurred for a purpose which is collateral,
- E** though beneficial, if it is outside one's own trade : *Hagart & Burn-Murdoch v. Inland Revenue Comrs.* (7). There was an analogy between that case and the present one in that there was the motive of support. When it is considered that Ohhams Press, Ltd., have a controlling interest in Coming Fashions, Ltd., and desire to help the company in which they hold shares, it cannot be said that there is no evidence on which

the commissioner can find that the money is not laid out exclusively for the benefit of Odhams Press, Ltd. On this part of the case, *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) has been relied upon. In the present case, there is no express finding as there was in that case. The relationship between a printer and the compilers of a periodical is different from that between a brewery company and the tenants of its tied houses. *Noble (B. W.), Ltd. v. Mitchell* (3) has been referred to, but that case is rather remote from this one. *Reid's Brewery Co. v. Male* (2) is a case which helps me, and not the appellant, because the decision is based on a finding that the moneylending was part of the brewery company's business. There are no grounds upon which the court can be asked to disturb the findings of the commissioner. In *English Crown Spelter Co., Ltd. v. Baker* (8), it was laid down that expenditure for the benefit of a customer was not deductible, because it was capital expenditure, or in the nature of capital expenditure. *Inland Revenue Comrs. v. Huntley & Palmers, Ltd.* (9) covers more ground than is necessary for my case. In that case, the companies were even more interlocked than they are in the present case, but they were two separate entities. In the present case, the contract was at the ordinary trade price. *Huntley & Palmers, Ltd.*, had really a stronger case. It was a transaction to keep a subsidiary company going, and that is the very reason why the writing off has been done in the present case. [Counsel referred to *Marsden (Charles) & Sons, Ltd. v. Inland Revenue Comrs.* (10) and *Baker v. Mabie Todd & Co., Ltd.* (11).]

Hills: This case can be confined to a narrow compass. We are dealing with the trade of the appellant company. They appealed to the commissioners on the ground that they ought to be allowed a deduction. The commissioners have found that it is not allowable, for two different reasons. There is nothing in this case which shows that the commissioners were wrong.

Tucker, K.C., in reply, referred to *Morley v. Lawford & Co.* (12) and *Moore v. Stewarts & Lloyds, Ltd.* (13).

SIR WILFRID GREENE, M.R.: This is an appeal from a decision of LAWRENCE, J., on an appeal by case stated from the Special Commissioners. The question is concerned with a certain sum of £2,927 5s. 8d., the nature of which I shall presently explain. The question which arose for consideration was, broadly stated, whether or not, in computing the profits of the appellants, Odhams Press, Ltd., for 1934-1935, the measure of such profits being the profits of the previous year, that particular sum of £2,927 5s. 8d. ought to be deducted.

When the matter first came before this court, it appeared, after the argument had proceeded some way, that two main questions were involved, one being whether or not this sum could be said to be a sum wholly and exclusively laid out or expended for the purposes of the appellants' trade, the other being whether, assuming that to be the

case, it represented a loss of capital withdrawn from, or employed in, the trade, or perhaps I should say more accurately whether it represented capital withdrawn from, or employed in, the trade. Those two questions emerged as the leading questions in the case, and we found ourselves confronted with the difficulty that the finding of the commissioners did not specify what their conclusions were on those two questions, but was what I may describe as a rolled-up finding, in which those two matters were not differentiated. The finding was this :

We the commissioners who heard the appeal held that the loss claimed was not an admissible deduction for income tax purposes.

- B That finding was consistent with the view that the commissioners, while holding that the money was wholly and exclusively laid out for the purposes of the trade, nevertheless considered the sum in question to be of a capital nature. It was also consistent with the view that, while holding it to be not of a capital but of a revenue nature, it was not
- C wholly and exclusively laid out for the purposes of the trade. In the course of the argument, it became manifest that this court was in a great difficulty in the absence of specific findings on two matters, one of which, at any rate (that of "wholly and exclusively"), has been treated always as a question of fact for the commissioners, the other one
- D (the question of capital) being perhaps a mixed question of fact and law. Accordingly, we took a course which I think commended itself to both sides, and we sent the matter back to the commissioners with instructions to add further findings by way of answers to two questions stated in the order as follows :

- E (a) Whether the sum written off was so written off wholly and exclusively for the purposes of the trade or business of the appellants, Odhams Press, Ltd. ; (b) whether the said sum represented, in the opinion of the commissioners, a loss of capital withdrawn from or employed in the trade of the appellants, Odhams Press, Ltd.

- The order then directed that the commissioners should in each case state the facts on which they based their findings, and both parties were to be entitled to call further evidence. Of the two commissioners who heard the original appeal, one had retired from the public service before the original case was stated, and the parties before us agreed that the matter, when remitted to the commissioners, should be heard by the one remaining commissioner who had signed the case, and that was
- G done. The matter was argued, fresh evidence was called, and we have now the supplemental case signed by the Special Commissioner in question. I will state the answers here, because I think it is convenient to do so even before I have gone more deeply into the facts.

- H The answers to the two questions put to the commissioner were, as to the first question :

The sum written off was not so written off wholly and exclusively for the purpose of the trade or business of the appellants.

The answer to the second question was that the sum in question

... represents capital withdrawn from or employed in the trade of the appellants. If either of those findings is capable of being supported, the appeal must

necessarily fail. It was said on behalf of the appellants by Mr. Tucker, in his very able argument, that the facts as stated in the supplemental case, coupled with those stated in the original case, were insufficient to support those findings. Indeed, he said—and certainly with regard to the first finding I think he was bound to say, in order to succeed—that the facts found compelled the commissioner to find the opposite, and to find that the sum was written off wholly and exclusively for the purposes of the trade. I think that he similarly argued that, in the matter of the second question, the commissioner was bound, on the facts found, to hold that this was not capital withdrawn from, or employed in, the trade.

I will state as briefly as I can the facts essential to an understanding of this judgment. The facts, of course, are set out in full in the two cases. The appellants are a well-known firm of printers and publishers, and they own all the shares of, or hold controlling interests in, a number of subsidiary companies largely connected with the newspaper trade. One of those subsidiary companies, being one in which the appellants own all the shares, is called Coming Fashions, Ltd. The business of Coming Fashions, Ltd., is the business of compiling and issuing for sale a periodical entitled *Everywoman's*, incorporating *Coming Fashions*. The production of that paper, of course, requires printing and publishing, and for some years these two operations were carried out by the appellants. They have now given up the printing and transferred it to another subsidiary company, in which they are interested, but they still continue to publish, although this case, I think, relates to the period when they were actually printing. As the result of the appellants performing those services for Coming Fashions, Ltd., which were performed upon a commercial basis, Coming Fashions, Ltd., incurred liabilities to the appellants on trading account. In addition to those liabilities, the appellants from time to time made large advances to Coming Fashions, Ltd. There is set out in the case an account differentiating between those classes of debt. On Dec. 31, 1933, the advances total £36,050, while the trading debt of Coming Fashions, Ltd., to the appellants is shown at a net figure of £7,191. That net figure was arrived at after taking the then outstanding figure of £10,118 and writing off it a sum of £2,927, which is the sum in question on this appeal. That sum in point of fact (ignoring the odd shillings and pence) represented exactly the debit balance upon the profit and loss account for the year ending Dec. 31, 1933, of Coming Fashions, Ltd. The balance sheet of that company shows the loss for the year, after certain adjustments, at that figure, and then that figure is annulled by the same figure being written in under the head: "Amount transferred to Odhams Press, Ltd." Similar transactions had occurred in previous years, and the balance sheet contains this note on the liabilities side:

Contingent liability. The voluntary reduction by Odhams Press, Ltd., of their credit balance by the amount of £15,805 12s. 5d. is liable at any time to revocation.

The argument before us was conducted on the basis that, from the side of Odhams, that reduction in the amount of the trading account was regarded as permanent. In other words, Odhams had no intention of ever calling upon their subsidiary to pay that amount. It was not conducted—and indeed could not, I think, have been conducted—on the footing that there had been any legal extinction of that amount of indebtedness, because there was no contract to that effect, there was no consideration, and it was not suggested that there was such a legal extinction. Nevertheless, for business purposes, from the point of view of Odhams, the sum was regarded as a sum to be permanently written off. It appears that it was a practice of the appellant company in dealing with its subsidiaries, when the subsidiaries made a loss in their accounts, to make such an adjustment of the inter-company accounts as would enable that loss to be written out of the subsidiary company's accounts. There are other matters in the stated cases which will require more particular examination, but what I have said is, I think, sufficient to enable the nature of the arguments to be understood.

By way of preface, it is, I think, important to bear in mind in dealing with income tax cases what is, of course, elementary, but nevertheless sometimes seems to recede into the background, that limited companies who carry on businesses are separate taxable persons, and the profits of their respective businesses are separate taxable profits. Companies who, if I may use a convenient expression, choose to carry on their businesses with the assistance of subsidiaries not infrequently find that for taxation purposes certain inconveniences result, owing to the fact that their subsidiary is a taxable entity separate from themselves. For instance, if the holding company, the parent company, is carrying on a business, and makes a profit, and the subsidiary is carrying on a business which perhaps originally formed part of the parent company's business but which for convenience has been transferred to the subsidiary, and in that business the subsidiary makes a loss, obvious difficulties appear in the way of treating the loss made by the subsidiary as a trading loss of the parent company. One result of the present claim, if it were successful, would be to transfer into the accounts of the holding company a trading loss of the subsidiary. I am not suggesting for a moment that this particular method of accountancy has been adopted with income tax in view. Indeed, if it had been, there would have been nothing wrong about it. What has been done, as it appears, has been done for good commercial reasons. However, that does not alter the fact that the result of the present claim, if it be correct, is to transfer for income tax purposes into the account of the holding company a loss suffered by the subsidiary company.

I will now refer to the particular matters on which great reliance is placed. First of all, it is pointed out that, in the supplemental case, there is the following finding :

One of the considerations which influence appellants in acquiring control of

these subsidiary companies is that the latter become "tied" to the appellants for the printing and other services necessary to put their periodicals in saleable form.

Reliance is placed upon that in order to bring the case within the principle of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1), to which I shall refer in a moment. In passing, however, I ought to point out that the fact there found is not that the only consideration which influenced the appellants was that of getting a customer for their printing business. That is only one of the considerations, and, as appears from the rest of the case, the appellants own all the shares in a company whose business is that of compiling and issuing for sale a periodical, a business which had passed through bad times, but which, as the secretary to the company had stated, as set out in the previous case, it was hoped would again become a paying concern. The relationship of the appellants to that company was, upon the facts as found, and of necessity, clearly a double relationship. On the one hand, they were the owners of all the shares in a commercial concern carrying on a business which it was hoped would earn profits, of which the appellants would, in one form or another, reap the benefit. If dividends were declared, they would obtain the dividends. If dividends were not declared, and the company merely built up reserves and then went into liquidation, they would profit in that way, of course. That one of the relationships was that of the holders of all shares in a profit-making concern is unquestionable. It appears on the face of the case. The other relationship is that of tradesman and customer. As a tradesman, the appellants print for the subsidiary, which is their customer, and by that means they hope to obtain profits. Indeed, as appears in the paragraph I have just read, one of the considerations which influence them in obtaining control of such a company is to enable them to make such trading profits. However, I am quite unable to read this case as meaning that that is the only consideration. Indeed, so to read it would be to fly in the face of what is manifest and apparent—namely, the existence of that other relationship.

The next matter in the supplemental case which is particularly relied upon is that :

The commercial community who have dealings with the appellants do not generally distinguish between the appellants and any of its subsidiaries, and they would so far regard Coming Fashions, Ltd., as being a part of the appellants' business as to attribute to the appellants any discredit resulting if Coming Fashions, Ltd., were to default to its creditors.

That, no doubt, is good business sense, but it is worth observing that there is no finding that the payment in question was made for the purpose of preventing Coming Fashions, Ltd., from defaulting to its creditors. There is no finding to that effect, and, therefore, I myself do not see that very much comfort is to be gained by the appellants from that paragraph.

The next paragraph relied upon is this :

If the accounts of Coming Fashions, Ltd., for any year showed a deficit, the appellants would come to the relief of the subsidiary company by making such

adjustment in the accounts between the two as would enable the subsidiary to balance its accounts for the year.

On those facts, coupled with those found in the original case, it is said that there was no evidence upon which the commissioner could come to the finding to which he did come, that the sum in question was not written off wholly and exclusively for the purpose of the trade or business of the appellants. That finding is embodied in a paragraph which, I think, I ought to read at length. It is as follows :

On these facts I am of opinion that Odhams Press, Ltd., in writing the sum of £2,927 off the trading account between themselves and Coming Fashions, Ltd., did so to enable Coming Fashions, Ltd., to continue to carry on its business as compiler and vendor of the "periodical" *Everywoman's*, and that, therefore, the sum written off was not so written off wholly and exclusively for the purpose of the trade or business of the appellants.

I must confess that I think the criticisms which have been made against that paragraph are a little hard upon the Special Commissioner. It seems to me to be reasonably clear. Reading the paragraph as a whole (and I think that the form of the conclusion and the nature of the conclusion throw light on the meaning of the language in the premises), it seems to me that what it means is that the business to enable the carrying on of which the payment was made was the business of Coming Fashions, Ltd. That does not, I think, exclude the view that there may have been also an interest in the carrying on of that business consisting of the interest of Odhams in obtaining printing orders for the future. The one thing the finding does not mean, however, in my judgment, is that the purpose of obtaining such printing orders was the only purpose for which the payment was made. The question as to whose business the payment was intended to benefit was a question which, of course, stood out from the very beginning in this case, and it was argued, and I have no doubt presented to the commissioner, with the greatest clarity by counsel for the appellants. He has, I think, quite clearly not accepted the argument that the business for the benefit of which the payment was made was the business exclusively of Odhams. If that be the true construction of the finding (and, in my opinion, it is the true construction), the only question that remains is whether or not there is to be found in the two cases facts sufficient to justify that conclusion. That conclusion is, of course, itself a conclusion of fact, but it is based, as the commissioner himself says, on other facts, which I may call primary facts, and, therefore, it is legitimate to examine those facts and to see whether they are sufficient to support that conclusion. I may say in passing that the phrase "On these facts" at the beginning of para. 2 cannot be construed as confining the material used by the commissioner to the facts actually stated in the case, but must be read as including the facts found in the original case. Indeed, Mr. Tucker very properly acceded to that view.

When one looks at the facts as stated in the two cases (and I do not propose to go through them again), in my view, it quite clearly emerges

that, there being these two relationships between the appellants and their subsidiary, from that circumstance alone it is impossible to say that there was no evidence on which the commissioner could find as he did find. That, to my mind, is an end of the case. The appellants have not succeeded in obtaining the finding of fact on this matter which is essential for them if they wish to claim this deduction. The rule, of course, is Sched. D, Cases I and II, r. 3 :

In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.

So far from showing that the commissioner, on the facts found, was bound to find that this sum was wholly and exclusively laid out for the purposes of the trade, the appellants, in my judgment, fail to show that there was no evidence on which he could come to the finding to which he did, in fact, come.

I do not leave the case without saying a word about the authority which was, as one would have expected, the sheet-anchor of the appellants' case. Numerous other authorities were referred to in the argument, but I do not think it necessary to examine them in detail. The case in question is *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1). The facts of that case are so familiar that I will not pause to state them here, but it is very important to appreciate the precise nature of the finding of fact in that case by the commissioners. Speaking of the tied houses in question there, the commissioners found at p. 435 :

The said premises have been acquired by the appellants and are held by them solely in the course of and for the purpose of their said business and as a necessary incident to the more profitably carrying on of their said business.

Pausing there for a moment, there is no such finding in this case with regard to the acquisition of the shares in the subsidiary company. On the contrary, the business consideration, from the point of view of obtaining printing orders, was only one of the considerations, and, therefore, there is that radical difference between the facts in *Usher's* case (1) and the facts in the present case at the very outset. Then the finding goes on (p. 435) :

The possession and employment of the said premises as aforesaid are necessary to enable them to earn the profits upon which they pay income tax, and without the said premises and their use as aforesaid the appellants' profits if there were any at all would be less in amount.

I am not sure whether I am right in saying all, but certainly some, of the opinions delivered in the House of Lords (I have not been through them all) place essential reliance upon the fact that the premises were acquired really as a business asset of the company, and for that purpose alone. I observe, for instance, that LORD PARKER says, at p. 461 :

It is clear that not only were the tied houses acquired and let solely for the purpose of the trade, but that the repairs were necessary to maintain the houses in such

condition that they could be used for the purposes for which they were acquired and let.

A It seems to me that really at the outset *Usher's* case (1) is ruled out as an authority which assists the appellants. They are unable to show that they acquired the shares in question for the sole purpose of obtaining printing orders. In fact, the case makes it clear that that was not so. That that was one of their purposes is unquestioned. It may be that they made this payment partly with a view to that particular purpose, but it is impossible to say, on the facts as found, that they did so exclusively for that purpose.

B Mr. Tucker then meets that argument in this way: He says: "Assume that there was a composite purpose—(i) the purpose of obtaining orders, and (ii) the purpose of maintaining in existence an investment which they hoped would be profitable—nevertheless, the payment, in so far as it is referable to the second of those two purposes, is a payment which
C can properly be deducted, for the reason that it is a payment made to conserve a business asset." He stated the proposition that any payment made to preserve a business asset is a revenue payment. I do not think that he can have meant it in quite such wide terms. In fact, he agreed that payments of that kind might be in themselves in the
D nature of investments. However, the difficulty in the way of accepting even a modified form of Mr. Tucker's proposition as bearing on the present case is that he fails to show that this item was a business asset in that sense. It is the same difficulty once again. *Qua* potential custom, the holding of these shares was beneficial to the business, but
E in other respects, *qua* investment, it had nothing to do with the business at all. It was merely an investment. Therefore, he is unable to show that a sum paid for the purpose of maintaining that asset in the sense in which he uses it is a sum which is expended for the purpose of maintaining what was simply and solely a business asset, and nothing more.
F I have said that that really disposes of the case, and, in the view I take, it is not necessary to consider the question whether or not this sum was in the nature of a capital sum. I therefore say nothing about the finding of the commissioner upon that point.

G There is just one point that I think I ought to have mentioned. The sum from which this amount was written off was, of course, a book debt, and, as such, it fell to be brought into the computation for the purpose of ascertaining profits and gains for income tax purposes. The amount written off it cannot be treated as an amount written off in respect of a bad debt, because the debt has never been extinguished
H in law, and it still remains. Indeed, in view of the note on the balance sheet of *Coming Fashions, Ltd.*, it would have been impossible to treat this as a bad debt for the purpose of the rule which deals with deductions for bad debts. It therefore stands as *prima facie* a good book debt, and the only way of getting an allowance against it is by writing it off on some grounds such as those here suggested to be available. I mention

the matter of book debts only in order that it may not be thought that I had forgotten it. In the result, the appeal is dismissed with costs.

SCOTT, L.J. : I agree.

CLAUSON, L.J. : I agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Simmons & Simmons* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at Law.*]

DALTON v. ADELPHI CLUB, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Macnaghten, JJ.), **October 20, November 29, 1938.**]

Gaming—Unlawful game—Stud poker—Gaming Houses Act, 1854 (c. 38), s. 4.

The respondents allowed a game called stud poker to be played upon their premises. This game is played by first dealing to each player one card face downwards, and then four cards face upwards. As each round of cards is dealt the player pays a stake into the pool or drops out of the game. The magistrate found that this was a game of skill and he dismissed the information :—

HELD : whatever degree of skill an experienced player of this game may acquire, the game always remains a game of chance, and is, therefore, an unlawful game within the Gaming Houses Act, 1854, s. 4.

[EDITORIAL NOTE.] In this case the court has again followed the decision in *Jenks v. Turpin* (1) in which it was said that every game of cards which is not a game of mere skill is an unlawful game. It is not sufficient that skill should be an element in the playing of the game. A card game must be a "game of mere skill" if it is not to be an unlawful game within the Gaming Houses Act, 1854, s. 4.

AS TO UNLAWFUL GAMES, see HALSBURY, *Hailsham Edn.*, Vol. 15, pp. 501, 502, paras. 904, 905 ; and FOR CASES, see DIGEST, Vol. 25, pp. 423-425, Nos. 260-270.]

Cases referred to :

(1) *Jenks v. Turpin* (1884), 13 Q.B.D. 505 ; 25 Digest 423, 260 ; 53 L.J.M.C. 161 ; 50 L.T. 808.

(2) *R. v. O.K. Social & Whist Club, Ltd.* (1929), 45 T.L.R. 570 ; Digest Supp.

(3) *R. v. Hendrick* (1921), 37 T.L.R. 447 ; 25 Digest 423, 255.

APPEAL by way of case stated from a decision of a metropolitan magistrate, dismissing certain informations preferred before him by the appellant, Henry Dalton, against the respondents, Adelphi Club, Ltd., and others, charging them under the Gaming Houses Act, 1854, s. 4, with using rooms for unlawful gaming. The facts are fully set out in the judgment of LORD HEWART, L.C.J.

G. B. McClure and *Maxwell Turner* for the appellant.

R. N. Bibby-Trevor and *P. H. M. Oppenheimer* for the respondents.

LORD HEWART, L.C.J. [delivering the judgment of the court]: The material words of the Gaming Houses Act, 1854, s. 4, are as follow :

A Any person, being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person . . . in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid . . . may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit and pay such penalty, not exceeding £500, as to such justices shall seem fit.

B The charge against Adelphi Club, Ltd., was that between Jan. 14 and Jan. 29, 1938, it used certain rooms at Nos. 118-132, New Oxford Street, in the county of London, for the purpose of unlawful gaming being carried on therein. Against the other respondents the charge was that they assisted in the conduct of the business of those rooms.

C The following facts were proved at the hearing before the magistrate. The Adelphi Club is a proprietary club owned by the respondents, Adelphi Club, Ltd., and it had the use of a set of rooms at Nos. 118-132, New Oxford Street, consisting of a large billiard-room and three small card-rooms. The other respondents at all material times assisted in the conduct of the premises. The number of members present in these rooms on Jan. 14, Jan. 15, Jan. 20, Jan. 21 and Jan. 29, 1938, varied D between 80 and 130 persons, and those playing cards varied between 7 and 20 persons. The profits of the card-rooms averaged about £12 15s. per week, and were derived mainly from the playing for money of a card game called stud poker, 1d. being deducted from each bet of 2s. No evidence was given by the prosecution as to the rules of stud poker, but, E in the course of the evidence for the defence, it was stated that stud poker was played at the Adelphi Club in the following manner. The dealer deals a card to each player. This card is dealt face down, and is looked at by the player to whom it is dealt only. A second card is then dealt to each player face upwards, so that all the players can see it. The F player to whom the highest card is so dealt then calls. That is, he pays in a stake to the pool. Each player then calls in turn. A player can either drop out, pay in the same amount as that called, or increase the stake put up by the caller. When the stakes are so increased, each player has to pay in the increased stake or drop out. Another round of cards G is then dealt to the players, again face upwards, and the same process takes place. Five cards are dealt in all, one face down and four face up. The winner is he who is left in the game with the hand of the highest value. Different values are allotted for various combinations of cards, e.g., pairs, threes, sequences, and the like. One of the respondents, who H was said to be an expert at stud poker, gave it as his opinion that it was a game of skill, and that skill predominated in it to a greater degree than it did in whist or bridge.

On behalf of the appellant, it was contended (a) that the Adelphi Club, Ltd., used the premises for the purpose of playing stud poker for money, and (b) that stud poker played for money is an unlawful game within

the meaning of the Gaming Houses Act, 1854, s. 4, in that it is a game of cards not being a game of mere skill.

It was contended on behalf of the respondents that stud poker is a game of cards in which skill predominates, and that therefore it is not an unlawful game within the meaning of the Gaming Houses Act, 1854, s. 4. The magistrate was of opinion, upon the evidence tendered by the respondents, that stud poker is a game of skill, and he dismissed the informations. He was not asked to find that it was a game of mere skill, and any such finding would have been obviously absurd. The question for the opinion of this court is whether or not his decision was correct in law.

Jenks v. Turpin (1) is the leading authority on the meaning and effect of the Gaming Houses Act, 1854, s. 4, and the judgments of HAWKINS and A. L. SMITH, JJ. (as they then were), contain a full and authoritative exposition of that section. It is a case often cited and as often approved and followed, as, for example, in *R. v. O.K. Social & Whist Club, Ltd.* (2) and *R. v. Hendrick* (3). In *Jenks v. Turpin* (1), the game in question was baccarat, and, in view of the decision of the magistrate in the present case, it is useful to quote a passage from the judgment of HAWKINS, J. After dealing with the common law relating to gaming houses, and the Acts which had from time to time been passed for the suppression of unlawful gaming, the judge said, at p. 524 :

The unlawful games, then, now are—ace of hearts, pharaoh, basset, hazard, passage, roulette, every game of dice except backgammon, and every game of cards which is not a game of mere skill ; and, I incline to add, any other game of mere chance.

Does baccarat come within this category ? The description of the game given by Mr. Russell satisfies me that it does. It is a game of cards. It is a game of chance ; and though, as in most other things, experience and judgment may make one player or banker more successful than another, it would be a perversion of words to say it was in any sense a game of mere skill. It is therefore, in my opinion, an unlawful game within the meaning of the statute.

Whatever the degree of skill an experienced player at stud poker may acquire, that game as described in the case must always remain a game of chance, and, in the language of HAWKINS, J., with regard to baccarat, it would be a perversion of words to say that it was in any sense a game of mere skill. We think, therefore, that the appeal should be allowed, and that the case should be sent back to the magistrate with a direction to find that the charges against the respondents were proved, with the appropriate consequences.

Appeal allowed with costs.

Solicitors : *Solicitor to the Metropolitan Police* (for the appellant) ; *Bernard Linder & Co.* (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

CRAIG v. DOVER NAVIGATION CO., LTD.

[COURT OF APPEAL (Slessor, Clauson and Goddard, L.JJ.), **November 28, 1938.**]

Workmen's Compensation—Sailor—Ship sent to mosquito-infested area—Death from yellow fever and/or malaria—Dangerous locality—Whether death due to injury arising out of his employment.

The deceased had been employed as a sailor on a ship that was sent up a mosquito-infested river in West Africa. It was found that his death was due to yellow fever and/or malaria caused by mosquito bites. It was contended for the employers that the death was due to a natural cause, and that this was a risk equally shared by everybody in the locality:—

HELD: there was a direct connection between the employment and this risk of exposure to a natural force, in that the deceased's employment was the cause of his being in a specially dangerous locality. His representative was, therefore, entitled to compensation.

Decision of His Honour JUDGE RICHARDSON ([1938] L.J.N.C.C.R. 183) reversed.

Karemaker v. Corsican (Owners) (11) considered.

[EDITORIAL NOTE.] Where, by the conditions of his employment, the workman is brought into contact with a special danger, it must be shown that he had to encounter that danger as a risk incidental to his employment. Where the danger arises from natural causes, it must be shown that the character of the employment created or intensified the risks that arose from those natural causes, so as to expose the workman to some peculiar or extraordinary danger. Where the risk is peculiar to a particular locality, it has to be shown that the employment brought the workman to that locality, and, in the opinion of the Court of Appeal, it is here shown that the employment of the workman brought him to a place where he might contract the disease as a result of which he died, and, therefore, his death is due to injury arising out of his employment.

AS TO RISKS INCIDENTAL TO EMPLOYMENT, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 168, 169, para. 358; and FOR CASES, see DIGEST, Vol. 34, pp. 318-323, Nos. 2604-2641. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 85-94.]

Cases referred to:

- (1) *Laurence v. Matthews (George) (1924), Ltd.*, [1929] 1 K.B. 1; Digest Supp.; 97 L.J.K.B. 758; 140 L.T. 25; 21 B.W.C.C. 345.
- (2) *Andrew v. Failsworth Industrial Society*, [1904] 2 K.B. 32; 34 Digest 318, 2605; 73 L.J.K.B. 510; 90 L.T. 611; 6 B.W.C.C. 11.
- (3) *Anderson (George) & Co. (1905), Ltd. v. Adamson* (1913), 6 B.W.C.C. 874.
- (4) *Martin v. Finch*, [1937] 2 All E.R. 631; Digest Supp.; 156 L.T. 447; 30 B.W.C.C. 99.
- (5) *Lander v. British United Shoe Machinery Co., Ltd.* (1933), 102 L.J.K.B. 768; Digest Supp.; 149 L.T. 395; 26 B.W.C.C. 411.
- (6) *Allcock v. Rogers* (1918), 87 L.J.K.B. 693; 34 Digest 315, 2582; 118 L.T. 386; 11 B.W.C.C. 149.
- (7) *Brooker v. Borthwick (Thomas) & Sons (Australasia), Ltd.*, [1933] A.C. 669; Digest Supp.; 102 L.J.P.C. 170; 149 L.T. 590; 26 B.W.C.C. 495.
- (8) *Thom (or Simpson) v. Sinclair*, [1917] A.C. 127; 34 Digest 320, 2619; 86 L.J.P.C. 102; 116 L.T. 609; 10 B.W.C.C. 220.
- (9) *Rowland v. Wright*, [1909] 1 K.B. 963; 34 Digest 316, 2596; 77 L.J.K.B. 1071; 99 L.T. 758; 1 B.W.C.C. 192.
- (10) *Warner v. Couchman*, [1912] A.C. 35; 34 Digest 318, 2604; 81 L.J.K.B. 45; 105 L.T. 676; 5 B.W.C.C. 177; *affg.*, [1911] 1 K.B. 351.

(11) *Karemaker v. Corsican (Owners)* (1911), 4 B.W.C.C. 295; 34 Digest 319, 2609.

(12) *Amys v. Barton*, [1912] 1 K.B. 40; 34 Digest 317, 2598; 81 L.J.K.B. 65; 105 L.T. 619; 5 B.W.C.C. 117.

APPEAL from an award of His Honour JUDGE RICHARDSON, dated May 6, 1938, given at the South Shields County Court. The facts of the case are fully set out in the judgments. The proceedings in the county court are reported in [1938] L.J.N.C.C.R. 183.

F. A. Sellers, K.C., and *Alexander Ross* for the appellant.

D. P. Maxwell Fyfe, K.C., and *J. Harvey Robson* for the respondents.

Sellers, K.C.: The judge was wrong on the authorities, and this is clearly a case of an injury arising out of the employment, so that the workman's representative is entitled to recover. If an accident is caused by a man being brought into a specially dangerous place in the course of his duty, then that is a risk arising out of his employment. [Counsel referred to *Lawrence v. Matthews (George) (1924), Ltd.* (1), *Thom (or Simpson) v. Sinclair* (8), *Martin v. Finch* (4), *Lander v. British United Shoe Machinery Co., Ltd.* (5) and *Allcock v. Rogers* (6). He was stopped by the court.]

Fyfe, K.C.: There is a distinction between this case and those cited. In cases of accidents shown to be directly due to natural causes, such as lightning, heat, cold—and, I would submit, mosquito-bites—it is necessary to show that there was some special risk to the applicant. None of the cited cases strikes at this principle. Otherwise every seaman who is sent to a foreign clime, and is thereby exposed to diseases and climatic risks, would be entitled to recover. Sending a man to a fever hospital would be different, because man, as opposed to nature, has collected the danger there in one spot. "Specially exposed" merely means "exposed further than the ordinary person." [Counsel referred to *Thom (or Simpson) v. Sinclair* (8), *Lawrence v. Matthews (George) (1924), Ltd.* (1), *Brooker v. Borthwick (Thomas) & Sons (Australasia), Ltd.* (7), *Warner v. Couchman* (10), *Karemaker v. Corsican (Owners)* (11), *Amys v. Barton* (12) and *Rowland v. Wright* (9).]

Robson, following on the same side: The essential element is in the word "employment." If it is a risk of employment, as opposed to a risk to life, then a man can recover. If it is a general risk to life, then he cannot.

Sellers, K.C., was not called on to reply.

SLESSER, L.J.: This is an important case, and we are very much indebted to counsel for the very complete argument which we have heard upon it, but, as we have come to a clear decision, we do not think it necessary to reserve this case for further consideration.

The facts of the case, so far as they are material, are these. The son of the applicant was a sailor employed upon a ship called the *Sea Rambler*, which left North Shields on June 5, 1936, and arrived at Dakar Roads,

on the West Coast of Africa, on June 19, 1936. From there it called at various ports. It returned to Dakar Roads on July 30, and from Dakar it sailed to a place called Kaolakh and from Kaolakh to Zinghinchor. For this purpose, it was necessary to run up a river. The judge has found on the evidence that at Zinghinchor mosquitoes were particularly numerous, and that, the ship having run ashore by the pilot station at the mouth of the river, where she was held up for a few hours, and having been refloated and anchored on the other side of the river, when she was so anchored a number of mosquitoes came aboard her. Then she left Zinghinchor on Aug. 5, and thereafter a number of unfortunate illnesses of the crew started which it is not necessary to detail, but, among others, the applicant's son was affected. Some of them died on board, and some of them were taken to the hospital in Funchal. Amongst others, the deceased man, Craig, died there in hospital. It was suggested at the trial that the cause of his death was either food-poisoning or poisoning by bad water. The judge, after a consideration of a great deal of the evidence, came to the conclusion that neither food-poisoning nor poisoning by bad water was proved, and he came to the opinion, after reviewing all the evidence of the medical and other witnesses, that :

All these men, including the deceased man Craig, died or were seriously ill as a result of either malaria or yellow fever or perhaps of both combined. On the whole of the evidence it seems very much more probable that it was yellow fever than malaria, or yellow fever and malaria rather than malaria alone.

Then he says that the probable cause of death was yellow fever, probably accompanied by malaria :

... and that contaminated food or bad water were not proved to have had any part in causing or accelerating his death.

In these circumstances, arbitration proceedings were brought by the mother of the deceased man claiming as a dependant under the Workmen's Compensation Act, 1925, and it was not really disputed that the accident was in the course of the employment. The whole question which arose below, and on which it was there decided, and which we have to consider here, was whether or not the accident arose out of the employment. The judge, having found the facts as I have stated them—that the man died from malaria, that such malaria was caused by mosquito bites, and that such mosquitoes were upon the ship when it was around about the port of Zinghinchor—held himself constrained to hold, on the authorities, that, on those facts so found, the workman had failed to prove, or his dependant had failed to prove, that the accident arose out of the employment. The principles in such a case are, I think, notwithstanding the mass of authority which has to be considered, reasonably plain. They are expressed by RUSSELL, L.J., in the convenient form of a code in *Lawrence v. Matthews (George) (1924), Ltd.* (1), at p. 18 :

Upon a consideration of the numerous decisions which were cited to us, the authorities to me seem to establish the following propositions. (1) If the accident

results from a risk which is necessarily incident to the performance of the servant's work, the accident arises out of the employment; all inquiry as to the frequency or magnitude of the risk is irrelevant, and it makes no difference that members of the public face the same risk. . . (2) If a workman is injured by an accident resulting from a risk to which everyone is subject, but of which it can be said that the workman runs more than the normal risk, the accident arises out of his employment, because the abnormal risk was necessarily incident to the performance of his work. That appears to me a correct statement of the decision of the Court of Appeal in *Andrew v. Fairclough Industrial Society* (2), where a bricklayer in an elevated position on a scaffold was killed by lightning. The proposition also covers the decision in *Anderson (George) & Co. (1905), Ltd. v. Adamson* (3), where the necessity of the workman to adopt a stooping position at his work caused him to run more than the normal risk. (3) If a workman is injured in an accident resulting from a risk to which everyone is subject but which is not necessarily incident to the performance of his work or to which he is not by his work abnormally subjected, the accident does not arise out of his employment.

That is the situation as contended for in this case by Mr. Maxwell Fyfe. However, the judge adds a fourth proposition, which it is said here for the appellant covers this case, in the following words, at p. 19 :

The authorities seem to me to establish a fourth proposition—namely, that sufficient causal relation or causal connection between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot. If such a locality risk is established, then the accident "arises out of" the employment, even though the risk which caused the accident was neither necessarily incident to the performance of the man's work, nor one to which he was abnormally subjected.

These propositions, including the fourth one, have been accepted, so far as this court is concerned, in two cases, first of all in *Martin v. Finch* (4), where in terms this court stated that they approved those propositions made in *Lawrence v. Matthews (George) (1924), Ltd.* (1) by RUSSELL, L.J., and secondly in *Lander v. British United Shoe Machinery Co., Ltd.* (5), where LORD HANWORTH, M.R., states in terms that he approves the propositions laid down by RUSSELL, L.J., in *Lawrence v. Matthews (George) (1924), Ltd.* (1). LORD HANWORTH, M.R., there in terms deals with the fourth proposition, and says in terms that he accepts what RUSSELL, L.J., had there said. RUSSELL, L.J., in *Lawrence v. Matthews (George) (1924), Ltd.* (1), having stated that the causal relation is established if the man's employment brings him to the particular spot where the accident occurs and the spot turns out in fact to be a dangerous spot, refers, as also does LORD HANWORTH, M.R., in *Matthews' case* (1), to the opinion of LORD WRENBURY in *Allcock v. Rogers* (6), where LORD SHAW makes it clear what is meant by a dangerous place. RUSSELL, L.J., says, at pp. 22, 23 :

For the present purpose a dangerous place is a place which as a place is dangerous—a place which has some quality which results in danger, for instance, that an insecure wall, which may fall, exists there.

It is said by Mr. Maxwell Fyfe that these opinions must be read subject to the opinion of the Privy Council as expressed in *Brooker v. Borthwick (Thomas) & Sons (Australasia), Ltd.* (7). There, as I read it, what LORD ATKIN is saying is that, if a workman is killed by some natural force, and if that force has no kind of connection with the employment, he cannot recover unless he can associate the injury with the employ-

ment, which he can do by showing that it exposed him in a special degree to the danger of injury more than a general member of the public—that is to say, more than what has been called a community risk. However, if he is injured by being in a special place where he works, then he at once provides the connection with the incidents of

A his employment by being able to show that, apart from some natural accident which befalls him in his work, he has specifically associated the accident with his employment, and, therefore, as LORD ATKIN says, nothing further need be considered. That is precisely what, I think, on the facts found in this case, this workman has succeed in doing.

B He has not shown merely that, when he was upon the seas, he was attacked by mosquitoes, as, for instance, he might have done if his whole case was that while he was going down the English Channel he was attacked by mosquitoes. The answer then would have been, in harmony with

C *Brooker's* case (7) and *Matthews' case* (1): “You have shown no more connection between your employment and your injury than any other member of the public could do.” What this man does is this. He, being a sailor, and being bound to go with the ship, shows that the locality where he suffered the injury, because he has to go practically where the ship takes him, was itself a spot where the injury would or might

D easily arise. In other words, as LORD PARMOOR points out in *Thom (or Simpson) v. Sinclair* (8), it is a risk reasonably incidental to his employment. In my view, therefore, the judge was wrong on the authorities, which seem to me, with one exception, to be all one way, in holding that, once it is established that this man was ordered into what I think he

E himself has found to be a place of peril, a place infested with mosquitoes from which he contracted yellow fever, there was any further burden on him for him to discharge to prove that this accident arose out of his employment. It is interesting to observe that in such early cases as *Rowland v. Wright* (9), this court seems to have come to very much

F the same conclusion. That was a case where a workman was taking his midday meal in his employer's stable, which was the proper place for him to be in, when he was bitten by one of the stable cats. The bite set up blood-poisoning and resulted in amputation of some of the fingers, and it was held, supporting the decision of the county court

G judge, that the injury arose by accident arising out of and in the course of the employment. SIR H. H. COZENS-HARDY, M.R., said, at p. 964 :

H The present case is the same as if the man had been an ordinary domestic servant whose duties took him into the place where the cat was. Neither the employer nor the man expected the cat to bite, but the man's duties took him into the place where the cat was.

Substituting the mosquito for the cat, it seems to me that we have here a very similar position.

I must just say one word about two cases that have been cited to us by Mr. Maxwell Fyfe which have given me some difficulty. They are *Warner v. Couchman* (10) and *Karemaker v. Corsican (Owners)* (11).

With regard to *Warner v. Couchman* (10), it appears that there had been a finding by the county court judge that there was nothing in the man's employment which exposed him to more than the ordinary risk of cold. He was a man who, going on his rounds on a cold day, had to take off his gloves in order to give change or write the sale down in his customers' books. There was, of course, no evidence there of any particularly perilous locality into which he was required to go, and it was really a question of fact as to whether the frost-bite was so reasonably incidental to his employment as to be a peril necessarily appurtenant thereto. However, EARL LOREBURN, L.C., in the House of Lords, said, at p. 37 :

In substance the learned county court judge seems to me to have found that in this case the man was not specially affected by the severity of the weather by reason of his employment.

As was pointed out in *Thom (or Simpson) v. Sinclair* (8), by VISCOUNT HALDANE, *Warner v. Couchman* (10), the frost-bite case is an excellent example of the reluctance of appellate tribunals to look beyond the findings of fact by the arbitrator. The actual language which VISCOUNT HALDANE uses is this, at p. 136 :

I turn now to the authorities to see what bearing they have on the construction of the statute. The first observation I must make is that decided cases afford less guidance than usual on such a question. The reason is that the appellate tribunals have consistently shown a proper reluctance to look beyond findings of fact by the arbitrator. This has been particularly so in the course of the decisions on the Act in your Lordships' House. *Warner v. Couchman* (10), the frost-bite case, is an excellent illustration of this, and in consequence nothing that was said there is authority on which the appellant here can rely.

In other words, as I read VISCOUNT HALDANE, it having been found as a fact in *Warner v. Couchman* (10) that the man suffering from the frost-bite had, nothing in his employment which exposed him to more than the ordinary risk of cold, it was no more than a finding that he was merely taking a community risk, and was not subjected to any special peril by reason of his employment. *Karemaker's case* (11) is a case which, on the face of it, does present more difficulty, because there a seaman was working in the harbour at Halifax. It was very cold—not abnormally so for the season—and his hands were badly frost-bitten by having to handle frozen ropes. SIR H. H. COZENS-HARDY, M.R., said, at p. 297 :

Halifax is a place where people do receive frost-bite, and therefore it is proper and necessary to take steps to guard against it. In that sense the liability to frost-bite is one of the normal incidents to which everybody is subjected by reason of the severity of the climate.

He then said that he did not wish to add anything to what he had said in *Warner v. Couchman* (10). I have already discussed *Warner v. Couchman* (10), and have pointed out, as VISCOUNT HALDANE points out there, that it is really laying down no principle at all, but it is based upon the facts of that particular case. In *Karemaker's case* (11), the county court judge had awarded in favour of the employers (p. 296) :

... on the ground that the workman had not satisfied him that the frost-bite was caused by any particular circumstance of the employment, or by any greater exposure to cold than was usual in the winter in that locality. . .

If that case shows no more than that, and it is founded on that finding of fact, I do not think that it is necessary to discuss it further. However, if it is to be argued that it is a variant of the decisions, and is supported by the decision of the Privy Council in *Brooker's* case (7), then I think, with respect, since it is a decision of this court and inconsistent with the judgment of the Privy Council in *Brooker's* case (7) and with what this court has followed in *Matthews'* case (1), that it cannot be followed. If it is to be taken as a decision that, where a man is sent into an area where people do receive frost-bite, and the fact is that in that area there is a special liability to incur that peril, then I think to that extent it cannot be followed. It seems to me to be inconsistent with what LORD ATKIN said in *Brooker's* case (7), that, if the man is in contact physically with some peril of the place where he works—in that case, the frost around his ship—it is an accident arising out of his employment, and nothing further need be considered. In other words, once he is brought into that place of peril, and suffers injury as a result of that peril, it is not possible to say that that peril does not arise out of his employment which requires him to be in that position. For these reasons, I am of opinion that this appeal succeeds.

CLAUSON, L.J. : I agree.

GODDARD, L.J. : I agree.

Appeal allowed with costs. Leave to appeal.

Solicitors : *Barnett Janner*, agent for *Winskell & Walker*, South Shields (for the appellant) ; *Botterell & Roche*, agents for *Botterell, Roche & Temperley*, Newcastle-upon-Tyne (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

NABARRO v. FREDERICK COPE & CO., LTD.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge), November 21, 1938.]

Negligence—House in course of erection—Occupation of site by building contractor—Duty to building owner—Licensee—Invitee—Intimation of possible visit by building owner.

The plaintiff engaged the defendants, a firm of building contractors, to build a house for him, and he gave them possession of the site in accordance with the building contract. The plaintiff visited the premises about a dozen times while the house was in the course of construction, and on each occasion the defendants' foreman went round with him. Although the plaintiff intimated his intention to visit the premises on Jan. 23, 1937, the foreman was not there, and the plaintiff walked over the premises alone. While walking, he stepped upon a plank which was apparently placed as a gangway, and, not being properly supported, it tipped up, causing him to fall and suffer injuries :—

HELD : in the absence of any contractual right in the plaintiff to enter the premises whenever he wished, there was no duty on the part of the defendants to see that the premises were reasonably safe or to warn the plaintiff of any concealed danger of the existence of which they were aware.

[EDITORIAL NOTE.] This case considers the application of the principles of negligence—more particularly those relating to invitees and licensees—to the case of a man who is having a house built for him, and pays a visit for the purpose of inspecting the progress of the work. Usually, of course, he will be conducted round the work by the contractor or his foreman, but the present case is concerned with the position arising where, on the occasion of his visit, the foreman is absent, and he makes his tour unaccompanied. A

AS TO INVITEES AND LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 596-612, paras. 846-863; and FOR CASES, see DIGEST, Vol. 36, pp. 35-49, Nos. 208-306.]

ACTION for damages for personal injuries suffered by the plaintiff through the negligence of the defendants. The facts are fully set out in the judgment. B

C. M. Picciotto, K.C., and J. C. Leonard for the plaintiff.

Kirkland F. Glazebrook for the defendants.

DU PARCQ, L.J.: The plaintiff in this case, Mr. Nabarro, a solicitor, claims damages from the defendants, who are builders. He says that they are liable to pay damages for personal injuries which he suffered because of their negligence. In Jan., 1937, the defendants were engaged in building a house for the plaintiff, and, while it was in an unfinished state, he visited it some time after midday on Jan. 23, 1937. He went there, as building owners are in the habit of doing, I suppose, to see how the work was getting on. His complaint is that, while he was walking over the premises, he stepped upon a plank, which was apparently so laid as to provide a gangway. He says that he was entitled to assume that it was safe, as there was nothing to show him that it was not, but that in fact it was in such a position that, when he stepped upon it, it tipped up and caused him to fall. As a result, he suffered painful, though luckily not very grave, injuries. He says that he went there with the knowledge and the consent of the defendants, as he was entitled to do, and he says that, in those circumstances, the defendants are responsible for his injuries. The defendants say that they were under no duty to the plaintiff. They deny that they were guilty of any negligence, and they say that, if they were, there was contributory negligence on the part of the plaintiff, because he ought not to have entered the house C
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... without guidance or assistance from any person who knew where it was safe to walk and without taking any precautions for his own safety [and also because] he failed to look where he was going or to test whether the planks upon which he walked were safe [and that] he tripped against a plank clearly visible.

As I find the facts, the defendants had possession of the site given to them in accordance with cl. 18 of the building contract. The plaintiff, however, had been in the habit of visiting the premises from time to time. I accept his statement that he had visited them about a dozen times. He says, and I think that this is of some importance, that whenever he visited the premises Mr. Davis, the defendants' foreman, went round H

with him. In answer to counsel for the defendants, he said: "Mr. Davis always went round with me." I have no doubt that a few days before Jan. 23, 1937, the plaintiff had had a conversation with Mr. Davis in which he had intimated to him that he would be coming to the premises on the following Saturday, Jan. 23, at about noon. Whether or not
A that was fully understood by Mr. Davis I am not sure. Certainly Mr. Nabarro, the plaintiff, intended to convey to him, and did his best to convey to him, the fact that he would be coming on the Saturday. Mr. Davis says that Mr. Nabarro frequently arrived on Saturdays between 11.30 a.m. and midday. On Saturday, Jan. 23, Mr. Nabarro
B did arrive, but Mr. Davis had gone. When Mr. Nabarro arrived, he saw some workmen there, including a man called Channell. Channell asked him who he was, and he said that he was the owner, and he was told by Channell, who was a labourer employed by Mr. Hawkins, a sub-contractor for the plastering, that "he had better go in and see
C how things were going on." Thereupon Mr. Nabarro entered the premises, and walked about. I need not follow the course he took. He made it quite clear by his evidence. When he got to a party wall which leads to the drawing-room, he was interested to see some work which was going on, and he stepped upon a short plank, apparently
D a short length of 4 ft. 2 ins., which appeared to him to slip, and it tilted up. I think no one can say that he was wrong in thinking it looked safe. I do not think anyone can say, assuming he had a right to be there and to be walking about, that he could have been expected to observe that it was dangerous—and I think it was in a dangerous position.
E I am bound to come to that conclusion on the evidence. It was not properly supported. Very likely it was supported on a piece of piping in such a way that, if a man of any weight stepped upon the plank, he would be injured. If, therefore, the position was that the defendants were the occupiers and the plaintiff was an invitee, or even a licensee,
F he would have a clear case against the defendants. However, I do not think that the case is anything like so simple as that. One has to look a little carefully at the facts and consider what the result of those facts is in law. This case is not quite analogous, on the facts, to any case which has been cited to me, but no doubt general principles of law
G based on those decisions will enable me to decide this case.

I think at first one may say this. It was the undoubted duty of the defendants, if they knew that someone was likely to come on the premises and to walk about on the premises for lawful purposes, not knowingly to leave upon the premises any concealed danger. I think, further, that,
H if they knew that there was coming to the premises a person who had a right to come upon them and to go where he would upon them, they would be under a duty to take reasonable care for his safety, and such reasonable care would mean that either they would see that the premises were safe or they must warn the person coming upon them of any danger. Such duty might involve careful inspection, but I do not think that

one would have to say that the premises must always be in such a condition that, if the owner chose to come and walk about on them, there would be neither concealed dangers nor any dangers. I do not think that it is contended here, nor could it be contended, that the owner has a general right to come upon the premises.

Mr. Picciotto, for the plaintiff, puts the matter quite differently. A He says that the owner has no general right to come upon the premises. The builders are in possession, and they are the occupiers. They can shut out the owner altogether, if they like, so he argued, and, if the owner does come, he comes as a licensee, or possibly, in certain circumstances, as an invitee. While I think that Mr. Picciotto was certainly right in B saying that the owner cannot insist at all times upon entering the premises, the owner must not come on the premises in such circumstances that he will obstruct the work which is being done. There is no contractual right, either express or to be implied, in this case given to the owner to enter whenever he wills, and certainly there is no duty C upon the builder to have the premises at all times ready and safe for a visit by the owner. Supposing the owner has intimated his intention of coming to the premises, then the question arises, it seems to me, whether, in the circumstances, the owner ought to have understood that he was requesting permission, or claiming the right, to come and D visit the premises and proceed where he would upon the premises and have reason to believe that that permission was being accorded to him or his claim to that right was being acceded to. If the builders had said, "You may come at such-and-such an hour on such-and-such a day to the premises, to inspect them by yourself and go where E you like," then it seems to me to be clear that they would be under a duty to see that those premises were reasonably safe for inspection, and, where they were not safe, to warn the owner that he ought not to go to that particular part which was dangerous. With those general principles in mind, I look at the facts in this case, and I am F struck by this. On several occasions, according to his own evidence, when he had previously visited the premises, the plaintiff had been escorted and taken round by Mr. Davis. There is no evidence that he had ever before walked about on these premises unaccompanied. Every- G body knows that there are dangers, and that there may be concealed dangers, upon premises in course of construction which are in the hands of workmen. At one moment a particular plank may be safe. Five minutes afterwards, because it has perhaps been shifted, it may be by a sub-contractor, or it may be by a careless workman, or it may be with some perfectly proper object, that plank may be unsafe. Every- H body knows that there is danger in walking about premises in that condition unless one has not only the permission of the people who are engaged in working on the premises but also the guidance of somebody who can point out dangers which one might not see for oneself. When Mr. Nabarro, the plaintiff, arrived, Mr. Davis was not there. The

plaintiff might have had a grievance even if this accident had not happened. He might very well have had a grievance because Mr. Davis was not there, and he could have said: "Mr. Davis is not here to show me round, and I cannot go round." However, that is not the grievance he is raising in this case, and I am not at all satisfied that the defendants

A were in such a position that they ought to have known that Mr. Nabarro would walk about on those premises without the guidance of the man who had always guided him before, or of somebody else delegated by him, or deputed by the defendants to take his place. I should have said that the duty of the defendants would be either to see that the premises

B were reasonably safe or to warn the plaintiff of any dangers, if it had been known that he was going to walk about on the premises. It is to be observed that, if he had been unable to make a tour of the premises in the absence of Mr. Davis, and if he had waited for another occasion when Mr. Davis had been there—although it might be extremely annoying

C if he had to wait—Mr. Davis would have been there to exercise the duty of giving a warning where a warning was necessary. If he had been showing him round, and this accident had happened, and there had been no warning, the position would have been very different. In the circumstances, however, I cannot find that the defendants were under

D the duty, merely because Mr. Nabarro had intimated that at some time on the Saturday about noon he would, or might, come in, of seeing that from noon onwards on the Saturday, during the whole of the rest of that day, these premises were in a safe and secure position for everyone who walked about them—that is to say, that every plank, for instance,

E was perfectly secure at every moment from noon onwards on that day. I do not put it on contributory negligence, because I do not think, in the circumstances, that there was a duty. It may perhaps be possible to put it, as Mr. Glazebrook was inclined to do, as contributory negligence, because I think that it may be fairly said that anybody who, without

F an escort, walks about a building of this kind is taking a considerable risk. I do not forget that Mr. Nabarro, when he had a conversation with the labourer Channell, who was employed by the sub-contractor, was told that he had better go in and see how things were going on. Mr. Picciotto has not, I think, relied upon that. Nor can it be relied

G upon. Channell had no authority from anybody to give such an invitation. He had no authority to say anything which would bind the defendants, and it is impossible to rely upon what he said. The whole matter may perhaps be summed up by saying that, whilst he had every right to be disappointed by Mr. Davis' absence, if he took it upon himself

H to walk about the house without guidance and to trust to every plank he saw as being a safe means of passage, he was taking a risk, and he cannot blame the defendants for the result of what he did. Everybody will sympathise with Mr. Nabarro in the very unfortunate accident which he sustained. Perhaps it may be as well to say, if the case should go any further, that I should have thought that the proper amount

of damages to award would be £120. As it is, I must, therefore, give judgment for the defendants.

Judgment for the defendants with costs.

Solicitors: *A. D. N. Nabarro* (for the plaintiff); *Hair & Co.* (for the defendants).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

Re MUSCOVITCH AND MUSCOVITCH, Ex parte MUSCOVITCH AND MUSCOVITCH, BANKRUPTS v. OFFICIAL RECEIVER.

[CHANCERY DIVISION (Farwell and Morton, JJ.), November 21, 1938.]

Bankruptcy—Appeal—Appeal from county court—Notice of appeal—Delivery of copy to registrar—"Forthwith"—Bankruptcy Rules, 1915, r. 132.

On Oct. 21, 1938, an order was made in the county court at Cardiff suspending the discharge of a bankrupt for a period. On Oct. 25, an appeal was entered in London, and a notice of appeal was sent to the solicitors at Newport and was received by them on Oct. 26. A copy of the notice of appeal was given to the registrar of the county court on Oct. 28. No reason was given for the delay, but it was not shown that any injustice was caused by the delay:—

HELD: the copy of the notice of appeal was not given "forthwith" to the registrar of the county court, as required by the Bankruptcy Rules, 1915, r. 132.

[EDITORIAL NOTE.] The point here is quite a short one, and turns upon the meaning of the word "forthwith" in the Bankruptcy Rule above referred to. It appears from this case that a copy of the notice of appeal must be delivered to the registrar of the county court at the earliest possible moment.

AS TO BANKRUPTCY APPEALS FROM COUNTY COURTS, see HALSBURY, *Hailsham Edn.*, Vol. 2, pp. 398, 399, para. 541; and FOR CASES, see DIGEST, Vol. 4, pp. 531, 532, Nos. 4867-4884.]

Cases referred to:

- (1) *Re Vitoria, Ex p. Spanish Corpn., Ltd.*, [1894] 1 Q.B. 259; 4 Digest 530, 4860; *sub nom. Re Vitoria, Ex p. Vitoria*, 63 L.J.Q.B. 161; 70 L.T. 141.
- (2) *Re Southam, Ex p. Lamb* (1881), 19 Ch.D. 169; 4 Digest 532, 4876; 51 L.J.Ch. 207; 45 L.T. 639.

APPEAL against an order, dated Oct. 21, 1938, made by the Cardiff and Barry County Court. The appeal was entered in London on Oct. 25. Notice of appeal, although required to be sent to the registrar of Cardiff and Barry County Court "forthwith," was not in fact sent to him until Oct. 28. Thereupon a preliminary objection was taken by the respondent that the appellants had failed to send the notice "forthwith."

G. F. Kingham for the appellants.

V. R. Aronson for the respondent.

FARWELL, J.: In my judgment, the preliminary objection here must prevail. I think it is a hard case, and I would avoid dismissing the appeal on that ground if I thought I was justified in so doing having regard to the authorities on the point. The preliminary objection is this. The order was signed on Oct. 21, being an order made by the

county court judge in the county court holden at Cardiff, for discharge which was suspended for a period. The appeal was entered in London on Oct. 25. On the evening of that day, a copy of the notice of appeal was sent by the London agents to the country solicitors at Newport. It was received by the solicitors at Newport on Oct. 26, and the notice
A was given to the registrar of the county court on Oct. 28. There is no satisfactory reason, or no reason at all, why there was any delay in the matter, but, of course, the position is that the delay was for only a short time, and no doubt it is true that no injustice is caused by any such delay. However, we are bound, in my judgment, by the rule and
B by the interpretation which has been put upon that rule by courts whose decisions are binding upon us. The rule in question, the Bankruptcy Rules, 1915, r. 132, is in these terms :

Upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the court appealed from, who shall mark thereon
C the date when received and forthwith file the same with the proceedings.

That rule has been considered by the Court of Appeal in more than one case, and, as I understand the decisions of the Court of Appeal, they come to this, that it matters not whether or nor the failure to comply with the rule strictly results in hardship, because the rule must be
D complied with, and the fact that there is no hardship if the time is extended is no reason for disregarding the strict compliance with the rule. That is exactly the effect of the decision in *Re Vitoria, Ex p. Spanish Corpn., Ltd.* (1). There the Divisional Court had thought that no hardship would be caused to anyone by extending the time, and
E they extended the time accordingly, and did not allow the preliminary objection. However, the Court of Appeal reversed that decision. LORD HALSBURY in his judgment said, at p. 263 :

... it is impossible not to see that the legislature for some good reason has not left the matter absolutely to the discretion of the court, but has given a rule to guide them in exercising that discretion. It would have been easy for the legislature
F to have said that, where no injustice resulted from non-compliance with the rules as to appeals, compliance with them might be dispensed with. It has not done so in any way. It has thought right to give a criterion to guide the court in the exercise of the discretion—which I admit exists—by saying that the appeal shall only be entertained if the rules are complied with.

The judgment of KAY, L.J., is to the same effect, at p. 264 :

I should be sorry to say that in no possible event could the discretion to enlarge the time be exercised ; but I do say that when you find an enactment in the Bankruptcy Act, 1883, s. 104 (d), that no appeal "shall be entertained" except in conformity with the general rules for the time being in force, and where one of those general rules says that upon entering an appeal a copy of the notice of appeal shall "forthwith" be sent by the appellant to the registrar of the court appealed from, then special circumstances must be shown in order to justify the court in
H extending the time for doing what the rule directs.

In the earlier case of *Re Southam, Ex p. Lamb* (2), in which also a preliminary objection was raised, LUSH, L.J., treated the word "forthwith" as meaning that the entry of the appeal and the giving notice to the registrar should be one continuous act, which must be done within a reasonable time. It is quite true that in those cases the time for appealing

had almost expired when the appeal was entered; I think it was the last day for appealing when the appeal was entered, and the delay in sending the notice to the registrar, if it had been allowed, would, in a sense, have been extending the time for appealing. As I understand the authorities, however, the effect of the decision is that, unless the court is satisfied that there are special circumstances, the rule must be strictly complied with, and that the word "forthwith" means that the copy of the notice shall be sent immediately upon the appeal being entered, or at any rate within a very short time, and, unless there are some special circumstances to enable the court to extend the time, the act must be done as soon as possible after the appeal has been entered.

In the present case, there was nothing whatever to prevent the London agents from sending the copy of the notice of appeal direct to the registrar of the county court. If that had been done, the registrar would have received it on Oct. 26. Instead of that, a copy was sent by post to the solicitors in Newport. They did not deliver it direct to the registrar. It was not until Oct. 28 that one of their clerks went to Cardiff and delivered the notice of appeal. In my judgment, that delay, although a comparatively short delay, is non-compliance with the rule, because it was not "forthwith."

Although I regret having to come to the conclusion, I do not think that it open to this court to say other than that the rule has not been complied with. That being so, the preliminary objection must prevail, and the appeal must be dismissed with costs.

MORTON, J.: I agree, and I share the regret which has been expressed by FARWELL, J., as I think that this is distinctly a hard case. However, it seems to me that to give effect to Mr. Kingham's argument is impossible. I think that logically the argument must involve that the sending a copy of the notice of appeal by the appellant to the registrar of the court appealed from within the time for entering an appeal, is sending the copy of the notice of appeal "forthwith" within the meaning of the Bankruptcy Rules, 1915, r. 132. I feel unable to give any such interpretation to the word "forthwith," and, that being so, I think that it is impossible to draw the line in any other way than that in which it has been drawn by FARWELL, J.

Preliminary objection upheld and appeal dismissed with costs. Leave to appeal.

Solicitors: *Hancock & Willis*, agents for *David Morris*, Newport, Mon. (for the appellants); *The Solicitor, Board of Trade* (for the respondent.)

[Reported by F. HONIG, Esq., Barrister-at-Law.]

HALLS v. HALLS AND LUKOVER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), November 28, 1938.]

Divorce—Wife's costs—Limited poor person's certificate—Husband in position to provide usual security—Amount of security—Matrimonial Causes Rules, 1937, r. 74 (3)—R.S.C., Ord. 16, r. 23 (3) (b).

Upon a petition for divorce by a husband, the wife obtained a limited poor person's certificate, i.e., a certificate admitting the wife to proceed as a poor person in such proceedings as were necessary to enable her to obtain an order for security for her costs. The wife then applied for an order for security for costs under the Matrimonial Causes Rules, 1937, r. 74 (3). An order was made limiting the security to the sum of £3, upon the ground that the wife could probably obtain further assistance under the Poor Persons Rules. It appeared from the affidavit by the husband in opposition to an application for alimony *pendente lite* that the husband's means were such as to justify the making of the order for security made in cases where there is no question of assistance under the Poor Persons Rules:—

HELD: the registrar had acted upon a wrong principle in taking into consideration what the Poor Persons Committee might or might not do in the circumstances of this case. The wife was entitled to the usual order which would have been made if she had not obtained the limited poor person's certificate.

[EDITORIAL NOTE.] *Prima facie*, the husband is bound to provide for the costs of his wife in divorce proceedings. In the present case, the result of the registrar's order would have been to throw upon the professional persons who assisted poor persons' cases the cost and burden of providing for the wife's defence. This he cannot do where there is before the court a husband with sufficient means to comply with the usual order for security made in divorce cases. In assuming that the wife would obtain a further order to proceed to trial as a poor person, the registrar, in the circumstances of this case, has acted upon a wrong principle.

AS TO WIFE'S COSTS UNDER POOR PERSONS RULES, see HALSBURY, Hailsham Edn., Vol. 10, p. 726, para. 1113; and FOR CASES, see DIGEST, Vol. 27, pp. 421-424, Nos. 4277-4307.]

Cases referred to:

- (1) *Allen v. Allen*, *Allen v. Allen & Bell*, [1894] P. 134; 27 Digest 421, 4278; 63 L.J.P. 78; 70 L.T. 326.
- (2) *Smith v. Smith & Rutherford*, [1920] P. 206; 27 Digest 423, 4291; 89 L.J.P. 175; 123 L.T. 174.
- (3) *Wilson v. Wilson* (1797), 2 Hag. Con. 203; 27 Digest 423, 4294.
- (4) *Bevor v. Bevor* (1809), 3 Phillim. 261; 27 Digest 469, 4918.
- (5) *Belcher v. Belcher* (1836), 1 Curt. 444; 27 Digest 465, 4859.
- (6) *Robertson v. Robertson & Favagrossa* (1881), 6 P.D. 119; 27 Digest 472, 4960; 51 L.J.P. 5; 45 L.T. 237.
- (7) *Williams v. Williams*, [1929] P. 114; Digest Supp.; 98 L.J.P. 40; 140 L.T. 383.

APPEAL from an order of HENN COLLINS, J., dated Nov. 1, 1938, dismissing an appeal from an order of the registrar. The matter arose on an application by a wife respondent for security for costs, under the Matrimonial Causes Rules, 1937, r. 74 (3). The question raised by the appeal was whether the security to be given by a husband for his wife's costs could be reduced to a nominal sum on the ground that the

wife could probably obtain assistance under the Poor Persons Rules. The parties were married in May, 1937. On Jan. 22, 1938, the husband petitioned for a divorce, and also asked for the discretion of the court to be exercised in his favour. On Apr. 27, 1938, the wife was granted a certificate under the Poor Persons Rules, but it was limited to such proceedings as were necessary to enable her to obtain security for costs. A The wife having petitioned for alimony *pendente lite*, the husband filed an affidavit showing his financial position.

A. T. Denning, K.C., and F. E. Hodgson (*Leslie Brooks* with them) for the appellant.

R. H. Bayford for the respondent. B

Denning, K.C. : The fact that a wife could obtain assistance from the bounty of others was never regarded, under the practice of the Ecclesiastical Courts, as a ground for relieving a husband of his liabilities. The same principle has been applied since the Divorce Court has been established. [Counsel referred to *Wilson v. Wilson* (3), *Beever v. Beever* (4), *Belcher v. Belcher* (5), *Robertson v. Robertson & Favagrossa* (6), *Allen v. Allen* (1) and *Smith v. Smith & Rutherford* (2).] C

Bayford : The registrar dealt with this case on the principle usually applied when the applicant has had a limited certificate granted to her by the committee. The registrar is able to check the means of the husband by the affidavit filed in the alimony proceedings. The position of the registrar is regulated by a direction referred to in *RAYDEN AND MORTIMER ON DIVORCE*, p. 174. R.S.C., Ord. 16, r. 23 (3) (b), provides that a person may proceed as a poor person if it is reasonable in the circumstances of the case. To succeed in this appeal, the appellant must show that the registrar has acted on a wrong principle. [Counsel referred to *Williams v. Williams* (7) and *Smith v. Smith & Rutherford* (2).] D E

SIR WILFRID GREENE, M.R. : In this case, the judge's order was made on an application for security for costs under the Matrimonial Causes Rules, 1937, r. 74 (3), and by it the husband, the petitioner in the divorce suit, was ordered to give security in the sum of £3, estimated as sufficient to cover the costs and expenses of the respondent of and incidental to the hearing or trial of the cause. I need not read the rest of the order, which is in common form. F G

It appears that, in making that order and in fixing that amount, the registrar acted upon the footing that the wife would be carrying on the rest of the proceedings as a person defending under the benefit of the Poor Persons Rules. The wife obtained from the Poor Persons Committee what is known as a limited certificate. The limited certificate is one given under R.S.C., Ord. 16, r. 23 (3) (b). Under that rule, the certificate is to certify, in the case of matrimonial causes where the wife is the poor person, in addition to matters relating to her own income and property, the following further matters : H

(a) that the poor person and her husband are not worth [the amount specified]

and that their joint income does not exceed [the amount specified], or [the alternative which was adopted] (b) that it is reasonable in the circumstances that the poor person should be admitted to take defend or be a party to the proceedings as a poor person; and if so whether the proceedings are limited to such proceedings as are necessary to enable the applicant to obtain security for her costs or are to extend to any, and what, further or other proceedings . . .

- A The certificate here was a certificate admitting the wife to defend proceedings, but the proceedings were to be limited to such as were necessary to enable her to obtain security for costs. She made the application for security, with the result that I have stated. The registrar made the order upon the hypothesis or the forecast that, if the Poor Persons Committee were thereafter approached, they would give a further certificate admitting the wife to continue the rest of the proceedings as a poor person.

- C That order is now challenged because, it is said, the effect of what the registrar has done has been to throw upon those who assist professionally in poor persons' cases the burden of litigation by the husband, for which the husband, not being himself a poor person, is capable of paying, and for which, according to the ordinary practice, he would be ordered to pay. The practice of ordering the husband to pay the wife's costs of defending divorce proceedings is a long-established one.
- D It comes down from the old days of the ecclesiastical jurisdiction, and has continued subsequent to the foundation of the Divorce Court. It has been followed notwithstanding the changes which have been introduced by the legislature in the status of married women and their rights of property. The present position is that the Divorce Court recognises
- E the right of a wife to have provided by her husband such payment as will enable her to avoid the injustice which she would suffer if she were not able to defend the proceedings. Of course, in applying this principle, the circumstances of each case have to be taken into account, but it has to be borne in mind that, as was said by DAVEY, L.J., in
- F *Allen v. Allen* (1), at p. 139 :

Prima facie, a husband suing his wife is, by the practice of the Divorce Court, liable to be ordered to make provision for her costs.

The husband is *prima facie* liable to make that provision, and the ordinary way in which it is done, in modern circumstances, is by ordering him

G to provide security by payment into court. That is done under the Matrimonial Causes Rules, 1937, r. 74 (3), to which I have referred. That rule says :

The registrar or taxing officer to whom such bill of costs is referred for taxation shall ascertain what is a sufficient sum of money to cover the costs of the wife of and incidental to the trial or hearing of the cause and may, unless the husband shall

H prove that the wife has sufficient separate estate or show other good cause, order the husband to pay to the wife or into court her costs up to the setting down of the cause and to pay into court or secure the costs of and incidental to the trial or hearing within such time as he may fix, and may direct a stay of the proceedings until the order is complied with.

Nothing I say must be taken as suggesting for one moment that, in applying that rule, the registrar is not entitled to take into account

all the circumstances of the case relevant to the exercise of his jurisdiction, but, in the present case, with all respect to him and to the judge who adopted his view, it appears to me that the registrar has proceeded upon a wrong principle. The husband in the present case is not a person who has obtained a poor person's certificate, nor, upon the facts before us, can we assume that he would be successful in doing so if he applied. A He is, therefore, a person who, *prima facie*, is bound to provide for the costs of his wife. The effect of what has been done is, as Mr. Denning truly points out, that the registrar, by forecasting what the Poor Persons Committee would do if a further application was made to it, has made an order the effect of which will be to throw upon the professional persons B concerned the cost and burden of providing for the wife's defence. It seems to me that the registrar, in considering the application before him, was not entitled to make such a forecast as to what the committee would or would not be likely to do. He had before him a husband C whose means were sufficient to enable an appropriate order to be made, and, if the wife had not obtained an order for assistance as a poor person, I cannot think that the registrar would have allowed his judgment to be affected by any view which he might have formed as to the probability of her obtaining gratuitous assistance under the Poor Persons Rules. The result of the order would be most unfortunate. What D would the wife be able to do now if she were to go back to the committee and ask for a further certificate? The Poor Persons Committee might take the view, on looking at the facts, that the costs of her defence ought properly to be borne by the husband. She would then reply to that: "But the registrar has thought otherwise." Then, if the committee; E after hearing the application, decided not to grant the certificate, the wife would have to go back to the registrar and say to him: "Your forecast as to what the committee would do has turned out to be wrong. Now please order further security." Then we might find the registrar taking the view that the committee had taken a wrong view of the F situation. I think myself that an estimate of what the Poor Persons Committee will or will not do in circumstances such as those in the present case is not a matter which the registrar ought to take into his consideration in deciding what security he will allow. If the husband G is the person who has obtained a poor person's certificate, the position may well be different. However, the present is not such a case, and I can conceive of no reason at all why the wife should be deprived of the usual and proper order which would have been made in this case if she had not obtained the limited poor person's certificate. The result H of that is that the appeal succeeds. The only question is whether we should ourselves fix the amount which the husband should be ordered to pay into court as security or whether we should remit the matter to the registrar. It would be very unfortunate that further costs should be incurred in a matter of this kind, and we think that we can properly fix the amount ourselves. As appears from *Smith v. Smith & Rutherford* (2),

the ordinary scale in a case such as the present would be about £25, and, in those circumstances, we fix the amount to be paid into court at £25. The order appealed from will be varied accordingly by substituting the sum of £25 for the sum of £3.

A FINLAY, L.J. : I agree with the judgment of SIR WILFRID GREENE, M.R., and I do not desire to add anything.

LUXMOORE, L.J. : I also agree.

B *Appeal allowed with costs. Order made that the petitioner give security in the sum of £25 (or a bond for £50) to be paid within 7 days after the service of the order of the court.*

Solicitors : *Shaen, Roscoe, Massey & Co.* (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *Wootten, Wallis & Metson*, Cambridge (for the respondent).

C [Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

HAWKER v. DONCASTER AMALGAMATED COLLIERIES, LTD.

[COURT OF APPEAL (Slessor, Clauson and Goddard, L.JJ.), November 29, 1938.]

E *Workmen's Compensation—Coal mine—Hauling coal—Hauling divided into four operations—One operation allotted to each of four boys—Allocation of operations altered from time to time—Applicant injured while performing operation not allotted to him—Whether applicant acting within the scope of his employment—Workmen's Compensation Act, 1925 (c. 84), s. 1 (2).*

F The applicant was one of four boys who were employed in hauling coal in a coal-mine. The process of hauling included four distinct operations, and from time to time one of these would be allotted to each boy by an overseer. It was proved in evidence that a boy might be allotted different operations at different times, and, further, that, if the telephone-bell rang, it was the duty of the boy who happened to be nearest to answer it, whereupon one of the other boys would temporarily take his place. When the applicant was injured, he was performing one of the operations which had not been allotted to him for that day :—

G HELD : (i) the applicant was employed generally to act as a hauler, and he was injured while acting within the scope of his employment.

(ii) the question of whether the applicant was acting within the scope of his employment was one of law, and one upon which the Court of Appeal was, therefore, entitled to reverse a county court judge.

H [EDITORIAL NOTE. An act of an employee is within the scope of the employee's employment, and, therefore, an accident arises out of and in the course of the employment where the employee is acting contrary to his instructions or statutory or other regulations, made in respect of such employment, so long as he is doing an act which he was employed to do. On the other hand, if he is doing an act which he was not employed to do, any accident arising will not arise out of and in the course of the employment. In the present case, the question is whether the employee was employed to do any one of a series of four operations, or whether he was employed to do only one of them. The four operations were necessarily

connected, and the employees performed any one of the four operations, according as they were instructed by the person in charge.

AS TO ACTS CONTRARY TO REGULATIONS, see HALSBURY, 1st Edn., Vol. 20, pp. 174, 175, paras. 365-367; and FOR CASES, see DIGEST, Vol. 34, pp. 298-301, Nos. 2476-2497. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 69-77.]

Cases referred to:

- (1) *Tucknott v. East Sussex County Council* (1935), 28 B.W.C.C. 42; Digest Supp.
- (2) *Matthews v. Victoria Spinning Co. (Rochdale), Ltd.* (1935), 29 B.W.C.C. 242; Digest Supp.; *sub nom. Victoria Spinning Co. (Rochdale), Ltd. v. Matthews*, [1936] 2 All E.R. 1359; 105 L.J.K.B. 521; 155 L.T. 363.
- (3) *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100; Digest Supp.; 102 L.J.K.B. 142; 148 L.T. 219; 25 B.W.C.C. 436.
- (4) *Privett v. Darracq Motor Engineering Co., Ltd.* (1934), 151 L.T. 211; Digest Supp.; 27 B.W.C.C. 163.
- (5) *Wilson & Clyde Coal Co. v. M'Ferrin, Kerr v. Dunlop (James) & Co.*, [1926] A.C. 377; 34 Digest 301, 2499; 95 L.J.P.C. 130; 135 L.T. 164; 19 B.W.C.C. 1; *affg. S.C. sub nom. M'Ferrin v. Wilson & Clyde Coal Co., Ltd., M'Aulay v. Dunlop (James) & Co., Ltd.*, 18 B.W.C.C. 630, 680.
- (6) *Parmley v. Enfield Rolling Mills, Ltd.* (1938), 31 B.W.C.C. 187; Digest Supp.
- (7) *Baker v. Bradford (Earl)* (1916), 85 L.J.K.B. 1031; 34 Digest 287, 2409; 114 L.T. 1144; 9 B.W.C.C. 436.

APPEAL from an award of His Honour JUDGE HILDYARD, dated July 7, 1938, and given at the Nottingham County Court. The facts of the case are fully set out in the judgment of SLESSER, L.J.

John Neal for the appellant.

John Russell for the respondents.

Neal: These boys were working as a team. They all worked together. This was, therefore, within the scope of the applicant's employment. There is no case where a man was injured while doing a job which he would have to do a day or two later, and it was then said that it was not within the scope of his employment. *Tucknott v. East Sussex County Council* (1) is difficult to reconcile with later cases, such as *Matthews v. Victoria Spinning Co. (Rochdale), Ltd.* (2). In any event, it seems to be irrelevant here, but it was relied on below. [Counsel referred to *Thomas v. Ocean Coal Co., Ltd.* (3) and *Privett v. Darracq Motor Engineering Co., Ltd.* (4)].

Russell: This case is concluded by a finding of fact, and, if there is any evidence to support a county court judge's finding of fact, this court will not disturb it. Once it is held that this was not the applicant's own job, that takes the case right out of the Workmen's Compensation Act. The applicant would never have met with this accident had he been doing the work he was supposed to do. [Counsel referred to *Kerr v. Dunlop (James) & Co.* (5), *Parmley v. Enfield Rolling Mills, Ltd.* (6) and *Baker v. Bradford (Earl)* (7).]

Neal was not called upon in reply.

SLESSER, L.J.: This case has given me considerable difficulty, and for some time I felt a doubt whether the finding of fact and

the inference of fact which the judge had drawn in this case were not such that the respondents were entitled to say that there was really no question of law raised by the appeal, and that the decision of the judge should not be disturbed. However, upon a close examination of the findings of the judge, and upon a consideration of the principles of law which have to be applied, I have come to the conclusion that the judge has come to a wrong decision in law, and, therefore, that this appeal should succeed.

The facts of the case, which are really not disputed so far as the accident is concerned, are these. A boy called Geoffrey Hawker was employed by Doncaster Amalgamated Collieries, Ltd., as a haulage hand. On Mar. 22, 1938, while carrying out his duties as a haulage hand (the particular work which he was doing being coupling full tubs), his head was caught between the tubs and he suffered severe injuries. It is agreed that, if he is right in saying that he can bring the case within the ambit of the Workmen's Compensation Act, 1925, he is entitled to receive, in respect of those injuries from that accident, 15s. 9d. per week, on the basis of total incapacity, from Mar. 22, 1938. It appears that the work of haulage involves different operations. First of all it is necessary to put clips, as they are called, upon the tubs, the second process is coupling the full tubs, the third process is uncoupling the empty tubs, and the last process is taking the clips off the tubs. There are, therefore, four processes which have to be performed in connection with the haulage of these tubs. On the day of the accident, there were four boys employed on this particular haulage work, and, as the judge tells us, each was performing what he calls a particular job. I prefer to say, in order that there may be no pre-judgment as to the nature of the employment, a particular process. Of those processes or jobs, the applicant's job or process was to take the clips off the tubs. There is no doubt about that. That of another boy was to put the clips on the empties, that of yet another boy was to couple full tubs, and that of yet another boy was to uncouple empty tubs. The applicant, the judge has found, was to take the clips off the tubs. This boy did not, at the time of the accident, do that work. He was actually coupling the full tubs, which the judge has found was not his work for that particular day. He was, therefore, doing something which I think that the judge has found—accepting, as he does, the evidence on behalf of the employers, as he was entitled to do—either that the boy was prohibited from doing, or, at any rate, that he received no instructions to do. The evidence that on that day he was doing what he ought not to have done is, first of all, that of William Hearst, who was in charge of the boys. He says this :

They have no right to change jobs without leave. If one leaves I put another to learn. I remember their coming, and they shout "Right?" and I say "Right." That means carry on. Hawker's job was taking clips off. Basford coupling. Whitehead clipping empties. Frogatt uncoupling empties. They had no right to shift over without orders from me. There was a notice in No. 2 pit bottom. They

are not restricted to ride down one pit. Notice near the wall 1 ft. square. Can't say how long it has been there. I have told them they must not change jobs, and have sent them back several times. They might change and I not know about it. Only when I put a lad on to learn that job. I have always stopped them when I knew.

Later, in cross-examination (there is really no substantial difference upon that matter), he denied—he had said that the four of them worked together A—that Hawker, the applicant, was in some way the leader. He said that he was the most experienced. Then there is the evidence of Mr. Ince, who is called the deputy corporal. He is the man who is second in command under Mr. Hearst, and he said: “Boys had no right to change jobs without corporal's permission.” He said that each boy had a B separate job, the corporal sets it out, and that he would have stopped the boy if he were doing a different job. Then followed the evidence, which I think is very important, as to the system by the assistant-corporal, Mr. Coxhedge. He said that there was no boy in charge:

I put them back on own jobs. I never saw them without changing them round. C No boy in charge not particular. Might be things happen—one must answer the telephone and some one must do his job meanwhile. No one's job to answer the telephone.

Then in cross-examination he said:

Nearest one to telephone will get on—his work will have to be done. . . . Not D exactly be a leader but some boys have more intelligence and could show it. What they call key chaps.

There was no evidence as to whether the telephone was ringing repeatedly or whether it rang in an emergency, which is probable, or only occasionally, but Mr. Coxhedge did deal clearly with the telephone rings, and said that the boy nearest to it had to answer it. Then the boy doing E something, putting on or taking off the clips, would go temporarily and do the job of the boy who was answering the telephone. That was the evidence. There is no doubt that the judge accepted the evidence given on the part of the employers, as he was entitled to do, and he comes to the conclusion that, without order or permission, the boys changed their F jobs, and the applicant was coupling full tubs. He says quite rightly that, on the authorities, to succeed where he is doing a prohibited act, or doing something contrary to instructions, it must be shown that the workman was acting within the scope of his authority, or, in other words, that he was doing what he was employed to do. It is obvious G from a mere inspection of the section that there may be occasions when a man may, within the sphere of his employment, be prohibited from doing what he was in fact doing, or be acting without, or contrary to, instructions, and yet it can be shown that what he did was for the purpose of his employers' trade or business, bringing himself within H sect. 1, in that the accident would be deemed to arise out of and in the course of the employment. Therefore, the question, which is envisaged in this case on the finding of fact which the judge made, is: Is it right to take the view as a matter of law that he has found upon any evidence, or could find, that these jobs, as he calls them, were separate employ-

ments, so that when this boy was coupling the tubs he was doing something which he was never under any contractual obligation to do, something outside the terms of his employment which he was never employed to do at all? In my view, it is not possible to come to any such conclusion upon the facts which the judge has found as a matter

A of law. I ask myself the question whether or not, if this boy was employed, on the day when he met with the accident, only to do the work he had been specifically instructed that day to do—namely, strike off the clips—had he then been asked at that very time by the employer, by the corporal or by some other foreman, to couple the tubs, he might

B have replied: “No, I am here to obey lawful orders within the terms of my employment. I was not engaged to couple tubs. I have been engaged solely to take off clips, and I will not do that, and there is no contractual relation between me and my employers requiring me to do that.” I do not say that the boy would formulate it in that precise

C way, but that is in substance what he might have said. On the other hand, if the true view be that this boy was employed as a hauler to do that particular process which the employer thought fit from moment to moment and from time to time to require him to do, the employer would answer: “Nonsense. It is true that I have told you to undo the clips,

D but now I tell you to couple the tubs, and your work is as much to couple tubs as it is to undo clips. In other words, your work is the work of a hauler, and it is your job to do any of the processes arising in that employment which from time to time, from day to day and from hour to hour, I instruct you to do.” If that is the true view, then this is the

E very case contemplated by subsect. (2), disobedience to prohibition—that is to say, prohibition to undo the clips—and the ignoring of the instructions to do the clips, and nothing else. In any view, he was working for his employers’ business, and I think that the judge was wrong in thinking that the contract of employment of this man upon

F this evidence was that he should only undo the clips. I think that it was employment generally to act as a hauler at any particular moment that any particular thing was to be done, and to do the work of a hauler on these jobs if the employer called upon him to do so. It would be highly artificial and contrary to good sense to come to any other conclusion.

G There is a further reason for coming to that conclusion. It was pointed out by CLAUSON, L.J., during the argument that this is to be found in the evidence of Mr. Coxhedge. So well-defined is the ambit of the workers’ employment from moment to moment that, at any time, quite apart from any specific direction, it is an implied term of

H each of the boys’ employment that the nearest one shall go to the telephone when it rings. We are not told how often that happens. I do not think that the calls were orders. There is no suggestion as to why the telephone rings. I do not know why the judge apparently related the question of emergency to this problem, because there is no question of emergency in this case, but the boy nearest to the telephone has to go

when it rings, and, if he does so go, according to Mr. Coxhedge, some other boy must continue his work. In other words, although this boy in this case had been instructed to strike off the clips, if the boy who was coupling the tub happened to be nearest the telephone when the bell rang, then, on the day he was to strike off clips, it would have been inside the former boy's instructions, even in the narrower sense, himself A to couple the tubs if the boy coupling the tubs was away answering the telephone. I cannot see that the judge has given any consideration whatever to that point. What he says is this :

It is true that in an emergency it was his duty to help the other boys even to the extent of doing the job of another boy if that boy had to leave it to answer the telephone, but no emergency is even suggested. B

If the judge means that there is not an emergency within the ambit of those cases which say that, in an emergency, he may, to protect his employers' property or interests, do something he is not employed to do in terms, and which it was an implied term that he should not do, I agree that there is no suggestion of emergency here. Why he C should say that the ringing of the telephone bell is an emergency within the meaning of those cases, I find it difficult to understand. I should have thought that the fact was that, once you had a telephone, it was apt to ring at undesirable times. When it rings, it is conceded, D having regard to the watertight compartments which are suggested in this case, that the boy who was on duty that day was entitled to leave the clips and to couple the tubs. It is impossible on this evidence to say that the finding that these are separate employments can be substantiated. I think that it is a question of law, and not an inference E of fact, because the judge has not put to himself the vital question as to what was the contract between the employers and the workman. It is that failure to consider the contractual relationship between the employer and the workman which has led him to think of the actual work which the boy was doing, as distinguished from the contractual F relation. For that reason, I have given judgment at some length, because, on the face of it, it might be argued that this was merely a question of fact, or an inference of fact. For these reasons, I have come to the conclusion that it is one of law, and, therefore, can be corrected by this court. This appeal, therefore, succeeds. G

CLAUSON, L.J. : I agree. When differing from an experienced judge, I think that I ought to express in a sentence or two the aspect of the case which, as I venture to think, makes it necessary for this court to reverse his judgment. MAUGHAM, L.J., in *Tucknott v. East Sussex County Council* (1), said, at p. 48 : H

There is a distinction between acts done in the course of the employment but in an improper way, and acts done outside the employment altogether. The distinction is in many cases very fine. It is clear from the authorities that, in spite of the change in the law referred to by my brothers (and see for that Mr. Willis's *WORKMEN'S COMPENSATION*, 29th Edn., at p. 63), there is still a distinction between prohibitions limiting the sphere of an employment and rules as to conduct within the sphere of that employment.

The question as it presents itself to my mind is whether, on the evidence, there is enough to enable the judge to hold that the control which was exercised by the corporal over these boys in respect of their work, was a control which laid down, and was intended to lay down, a prohibition limiting the sphere of each particular boy's employment to one particular job, or whether it was rather of the nature of a control which was intended to regulate the conduct of the boys within the sphere of their employment as haulage hands. The piece of evidence which, in my judgment, makes it quite impossible, on the facts as they appear on the evidence, to hold that the corporal's control was a control that limited the sphere of a boy's employment to the particular job or the particular portion of the process which he was ordered to undertake on a particular day is this. It is clear on the evidence that, if for any reason one boy of the four was prevented for the moment from doing his particular part of the process, having regard to the necessity that the combined processes should be carried on in order that the work of the mine should not be stopped, it became necessary for one of the other boys temporarily to lend a hand to do the absent boy's work until the absent boy could get back again. That seems to me crucial to show that the allocation of the separate processes among the boys is a mere matter of a rule of conduct within the sphere of their employment together to deal with the job, which is composed of four processes. In view of that, it appears to me that the judge was misdirecting himself in coming to the conclusion that he did—namely, that each process was a separate job shut up in a watertight compartment as between itself and the other three processes. That being my view of the position, it appears to lead inevitably to the result that the appeal must succeed. I also agree with the reasons SLESSER, L.J., has delivered.

GODDARD, L.J.: I agree. I think that it is a reasonably clear case. In case it should be thought that I am differing from the judge on a question of fact, I base my judgment on the proposition that there was no evidence here upon which the judge could find that the scope of the employment of this boy was limited to taking off the clips. I think that all the evidence given by the applicant or the respondents is the other way. The error into which the judge fell was that there has been confusion between what the boy was employed to do and, during the employment, how the employment should be carried on. Let me give a simple illustration. If I employ a gardener, any work connected with the garden is within the scope of his employment. If I tell him one morning to plant potatoes, and for some reason he chooses to disregard that direction, and picks fruit from the trees, and falls off the ladder and is injured, it seems to me that it would be impossible to say that in picking the fruit he was not acting within the scope of his employment. He was. What he is doing is disregarding the direction given by his employer in the course of that employment. Here there were

four processes connected with the hauling of the tubs and the returning of the tubs to the level—namely, clipping them on, coupling them and uncoupling them, and taking the clips off. Four boys were engaged to do these processes. Any one of those boys might have been ordered to do any one of those processes, and they were all ordered to do each one of them from time to time. The particular operation was changed from time to time. It is clear on the evidence that at any moment the corporal who had charge of these boys could have changed any boy's particular job, and could have told him to do one or other operation. CLAUSON, L.J., has pointed out that it is also clear that, if the telephone bell rang, and one boy had to answer it, his particular work had to be done by one of the other boys while he was answering it, because the rules were that the road should be kept going. Similarly, if a boy got into a difficulty with his particular operation, such as uncoupling the tubs, one of the other boys would go and help him. In those circumstances, it is clear that there was evidence upon which the judge could find that the boy's employment was uncoupling the tubs, and nothing else. The scope of his employment was to do anything he might be required to do in the course of those operations. He was engaged as a boy, and the particular task he had to do on any particular day was allotted to him. That does not alter the sphere of his employment. For these reasons, I think that the judge was clearly wrong in limiting the scope of his employment. He ought to have found that the scope was controlled by the contract of employment with the boy, and it seems to be clear that the boy was acting within the scope of his employment when he was injured, having regard to the particular method he had to adopt.

Appeal allowed with costs.

Solicitors: *Corbin, Greener & Cook*, agents for *Raley & Sons*, Barnsley (for the appellant); *Johnson, Weatherall, Sturt & Hardy*, agents for *Parker Rhodes, Cockburn & Co.*, Rotherham (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

WHATMOUGH v. MORRIS MOTORS, LTD.

[CHANCERY DIVISION (Simonds, J.), **October 19, 20, 25, 1938.**]

Patents—Practice and procedure—Action for infringement—Counterclaim for revocation—Summons for directions—Statements signed by counsel—What particulars may be ordered—R.S.C., Ord. 53A, r. 21A (2).

In a patent action, where statements signed by counsel are ordered under the provisions of R.S.C., Ord. 53A, r. 21A (2), it may be ordered that such a statement shall include particulars of lack of utility, want of subject-matter, insufficiency, and lack of novelty. Particulars of common general knowledge will not, however, be ordered.

[EDITORIAL NOTE.] In this interlocutory matter the substantial question was whether the particulars that would be ordered would include particulars of

common general knowledge. These particulars have, however, not been allowed.

AS TO INTERLOCUTORY PROCEEDINGS IN PATENT ACTIONS, see HALSBURY, *Hailsham Edn.*, Vol. 24, pp. 679-685, paras. 1277-1282; and FOR CASES, see DIGEST, Supp., Patents, Nos. 2944a, 2944b. See also YEARLY SUPREME COURT PRACTICE, 1939, pp. 1018-1020.]

A Cases referred to :

- (1) *Fraser v. Simpsons (Piccadilly), Ltd., and Platinum Products, Ltd.* (1937), 54 R.P.C. 199; Digest Supp.
- (2) *Eyres (J. & S.), Ltd., and John Eyres v. John Grundy, Ltd.* (1938), 55 R.P.C. 149; Digest Supp.

B SUMMONS for directions under R.S.C., Ord. 53A, r. 21A (2). This was a patent action in which the material portions of the order made by the court at hearing of this summons were as follow :

C 1. That the plaintiff does on or before the day of deliver to the defendants a statement signed by counsel referring to every claim of each of the letters patent Nos. 303,592,* 319,810 and 373,991 alleged to be infringed and . . . (b) stating in the case of each parts and features whether the words in the claim denoting the same include every construction which and only such constructions as fall within the said words in their ordinary meaning in the art when read apart from the body of the specification and whether some and if so what limitation or extension is to be implied therein and in such case stating the reasons for such implication.

D 2. That the defendants do within one month of the receipt of the statement referred to in para. 1 hereof deliver to the plaintiff a statement signed by counsel specifying : (a) the extent to which the defendants accept the contentions set forth in the plaintiff's said statement and in so far as the same are not accepted stating the defendants' contentions in respect of the said matters ; (b) in respect of each of the documents alleged to have been published and each of the constructions alleged to have been used prior to the date of letters patent No. 303,592* as set forth in para. 1 of the particulars of objections and relied upon by the defendants the relevant parts and/or features of construction and design alleged to have been disclosed by each of the same and in the case of the said documents the passage or passages thereof relied upon ; (c) the respects in which it is alleged that the invention the subject of letters patent No. 303,592* was not proper subject-matter for the grant of letters patent having regard to each of the matters referred to in para. 1 of the particulars of objections ; (d) the respects in which it is alleged that the said invention is not useful ; (e) the respects in which it is alleged that the complete specification of letters patent No. 303,592* does not sufficiently and clearly ascertain

F the scope of the monopoly claimed therein ; (f) in respect of each of the documents alleged to have been published and each of the constructions alleged to have been used prior to the date of letters patent No. 319,810, as set forth in para. 6 of the particulars of objections and relied upon by the defendants the relevant parts and/or features of construction and design alleged to have been disclosed by each of the same and in the case of the said documents the passage or passages thereof relied upon ; (g) the respects in which it is alleged that the invention the subject of letters patent No. 319,810 was not proper subject-matter for the grant of letters patent having regard to each of the matters set out in para. 6 of the particulars of objections ; (h) the respects in which it is alleged that the said invention is not useful ; (i) the respects in which it is alleged that the complete specification of letters patent No. 319,810 does not sufficiently and clearly ascertain the scope of the monopoly claimed ; (j) the claims of letters patent No. 319,810 which are alleged to have been the subject of a prior grant to the patentees of letters patent No. 303,592* stating in respect of each such claim the part or parts and/or feature or features of construction and design which are alleged to be comprised in such claim and which are to be found in any claim of letters patent No. 303,592* and specifying in respect of each such claim of letters patent No. 319,810 the claim or claims of letters patent No. 303,592* which are alleged to comprise the said part or parts and/or feature or features of construction and design.

G. H. Lloyd-Jacob for the plaintiff.

W. Trevor Watson, K.C., and Basil Drewe for the defendants.

SIMONDS, J. : This is a summons under R.S.C., Ord. 53A, r. 21A (2), which provides that, upon an application, in effect an application for directions :

... the court or judge may give such directions : (a) for the delivery of further pleadings or particulars ; (b) for the delivery of statements signed by counsel setting out all the contentions whether of fact or law (including contentions as to the construction of the specification or other documents) upon which the parties respectively intend to rely ; (c) for the taking by affidavit of evidence relating to matters requiring expert knowledge, and for the filing of such affidavits and the delivery of copies thereof to the other parties ; (d) for the making of experiments, tests, inspections or reports ; (e) for the hearing, as a preliminary question, of any question that may arise (including any question as to the construction of the specification or other documents), and otherwise as the court or judge may think necessary or expedient for the purpose of defining and limiting the issues to be tried, restricting the number of witnesses to be called at the trial of any particular issue, and otherwise securing that the case shall be disposed of, consistently with adequate hearing, in the most expeditious manner.

That rule introduced an entirely new procedure into the conduct of patent actions, and in particular in its reference to contentions as to the construction of the specification or other documents, which was directly counter to the practice which had prevailed ever since patent actions assumed their present form.

In that state of the rule, CLAUSON, J., as he then was, in a case which came before him—namely, *Fraser v. Simpsons (Piccadilly), Ltd., and Platinum Products, Ltd.* (1)—elaborated a form of order which gave full effect, if I may so describe it, to what appeared to be the policy of the rule. In the only other reported case in which the rule before the court has been under consideration—namely, *J. & S. Eyres, Ltd., and John Eyres v. John Grundy, Ltd.* (2)—FARWELL, J., expressed the view, at p. 151 :

In a simple case not involving much technical instruction, to require a statement of contentions might lead to expense that would not be justified.

In that case, although not assenting to the proposal that there should be signed statements in his order for particulars and so forth, he went far beyond the old practice.

In the present case, the position is this. The parties agreed that it was a case in which a signed statement was desirable for the purposes of clarifying and of limiting the issues, but as to the contents of that signed statement they were in some conflict. Accordingly, the matter has been argued before me. I must say that, in the state of the authorities, I find considerable difficulty in determining what course should be pursued. However, upon such a cursory examination of the specification and claims as has been possible, it appears to me that this is a case which by no means falls within the category of cases described by FARWELL, J., as simple cases not involving much technical instruction. Accordingly, it seems to me that this is a case in which *prima facie* I ought to conform to the policy of the order and rule, and adopt the form of order which was laid down by CLAUSON, J. I think in particular that it is a case in which I should assent to the defendants' view that the plaintiff should be under the obligation of stating what is in effect the construction which he puts upon his claims. Therefore, upon the first of the two matters

which have been in dispute between the parties, I think that the order should provide for the direction which is contained in para. 1 (b) of the draft minutes of order which are before me. Upon that part of the case, therefore, I decide in favour of the defendants.

The next point at issue is whether the particulars for which the plaintiff is contending should be embodied in the defendants' signed statement. Upon that point, I think that the plaintiff is right. It appears to me that in this respect also it will tend to limit and define the issues if the defendants have imposed upon them the burden which the plaintiff seeks to put upon them in these particulars. Accordingly, I shall order the defendants in their signed statement to give the particulars which appear in the draft minutes, as originally framed, those being the matters which the defendants have sought to strike out by their red-ink amendments. I shall not, however, require the defendants to give particulars of the matters alleged by them to be common general knowledge. That applies to each of the several patents which are the subject of dispute in this action. There are certain other amendments, which I think are really due to clerical error, about which the parties have agreed, and about which I need say no more. I shall, therefore, make the order in the form of these draft minutes, subject to the amendments which I have described.

Solicitors: *C. R. Enever & Co.* (for the plaintiff); *Preston, Lane-Claypon & O'Kelly*, agents for *Andrew Walsh & Son*, Oxford (for the defendants).

[Reported by W. K. SCRIVENER, Esq., 'Barrister-at-Law'.]

JACKSON v. HAYES CANDY & CO., LTD.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge), **November 21, 22, 1938.**]

Master and Servant—Contract of service—Duration—Presumption of yearly hiring—Commission only payable for a complete year.

A contract of service was made by letter stating that as from Dec. 20, 1931, the plaintiff's salary was to be £340 per annum. Subject to certain conditions, the plaintiff was to receive a commission of $\frac{1}{4}$ per cent. of the turnover in excess of £40,000. The following phrase was added: "No commission to be payable except for a complete year." On Aug. 7, 1936, the plaintiff was given one month's notice to terminate his employment. He was offered, but declined, employment in a different capacity and at a lower salary:—

HELD: (i) the terms of the contract, especially that relating to commission, were those of a yearly hiring, and the contract was only determinable, therefore, at the end of a complete year of the service.

(ii) the plaintiff was entitled to what he would have earned from Aug. 7, 1936, to Dec. 19, 1936, less any sum that he in fact earned between those dates.

(iii) the plaintiff was entitled to refuse the employment in a different capacity and at a lower salary.

EDITORIAL NOTE. The judgments in *De Stempel v. Dunkels* (1) have been considered in two recent cases apart from the present one: *Vernon v. Findlay* (2) and *Fisher v. W. B. Dick & Co., Ltd.*, [1938] 4 All E.R. 467; Digest Supp. The question in all these cases is how far there is still a presumption of a yearly hiring. In times gone by, the circumstances in which persons were hired made this presumption a very usual one, but in modern times it would seem that the presumption is not often available. The present case, in which the presumption has been applied, is, therefore, to be regarded as an exception to the general rule. A

AS TO YEARLY HIRING, see HALSBURY, Hailsham Edn., Vol. 22, pp. 144-146, paras. 235-238; and FOR CASES, see DIGEST, Vol. 34, pp. 52-58, Nos. 263-333.]

Cases referred to :

- (1) *De Stempel v. Dunkels*, [1937] 2 All E.R. 215; Digest Supp.; 156 L.T. 418; B
varied on appeal, [1938] 1 All E.R. 238; 158 L.T. 85.
- (2) *Vernon v. Findlay*, [1938] 4 All E.R. 311; Digest Supp.
- (3) *Fairman v. Oakford* (1860), 5 H. & N. 635; 34 Digest 57, 327; 29 L.J. Ex. 459.
- (4) *Buckingham v. Surrey & Hants Canal Co.* (1882), 46 L.T. 885; 34 Digest 64, 392.
- (5) *Cayme v. Allan, Jones & Co.* (1919), 35 T.L.R. 453; 34 Digest 56, 308. C

ACTION for damages for wrongful dismissal. The facts are fully stated in the judgment.

C. N. Shawcross for the plaintiff.

Robert Fortune and *C. Gordon Thompson* for the defendants. D

DU PARCQ, L.J. : The claim in this case is for wrongful dismissal. This action, let me say in favour of the defendants, is not a case in which a man has been unjustly or harshly treated, or accused of things he has not done, or anything of that sort. I have no doubt at all that the defendants have desired to treat the plaintiff with every consideration. I have to decide questions of law. What happened was that on Aug. 7, 1936, the defendants gave Mr. Jackson one month's notice to terminate his employment with them. I have no doubt that they thought that they were legally entitled to do that. They added that, in view of his long service, they were prepared to pay him 3 months' salary in addition to what was already due to him up to Aug. 8, and, also, salary for an additional 2 weeks in substitution for his holiday, and they offered to pay a sum of money which covered those various heads. It was refused, and they had before that, as I am reminded by Mr. Fortune, offered the plaintiff employment in a different capacity and at a lower salary in lieu of the employment he held. That offer he declined. I think that he was entitled to decline it, because it was an unreasonable suggestion to make, and I do not think that I can take that into account when it comes to a consideration of questions of damage. E
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What the plaintiff says is that he was not subject to dismissal at a month's notice, that he ought to have had a much longer notice, and, what is important in this case, that, inasmuch as his employment was what the law calls a yearly hiring, it could only be terminated by a notice ending with the year of the contract. That contention raised

an interesting point. The contract in this case is in these terms, and it is in the form of a letter dated Dec. 19, 1931 :

Dear Mr. Jackson, We hereby put on record the arrangement between us, as from Dec. 20, 1931. Your salary to be £340 per annum. Commission $\frac{1}{4}$ per cent. over £40,000 on the turnover of the cotton department, provided (a) the profit is $12\frac{1}{2}$ per cent., (b) the finishing stock has been turned six times during the year, (c) stock and commitments have been kept according to ration. No commission to be payable except for a complete year. This arrangement is, of course, contingent on your being fit and able to carry out your duties to the satisfaction of the board. If you agree these terms, please sign counterpart and return to [the managing director].

The letter is signed by Mr. Gilloch, the managing director.

The law with regard to the duration of contracts between master and servant is set out in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, p. 144, para. 235. The only words which I need read from it are these :

If a contract of hiring and service is a general hiring, that is to say, without limitation of time, there is a presumption that the hiring is for a year, whether the contract is oral or in writing. This presumption exists not only when the original contract was a general hiring, but also when, at the expiration of a contract for a definite period of service, the service is continued under a second contract which is indefinite as to time. . . . The presumption of a yearly hiring is capable of rebuttal ; it is not an inflexible rule and must be considered in connection with the circumstances of each case.

Those words are contained in an article for which I see that HILBERY, J., is one of the writers responsible. It is not, of course, authoritative, and I would not quote that passage at the beginning of my judgment but for the fact that it has been in terms approved by one of the members of the Court of Appeal very recently—that is to say, by SLESSER, L.J., in *De Stempel v. Dunkels* (1). SLESSER, L.J., said, at p. 252 :

. . . there is no doubt in my mind that the law is correctly summarised in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, p. 144. . .

Then he cites the passage which I have just read. I am inclined to think that that statement of the law, correct though I believe it to be, would probably surprise a great many people. I do not think that it is always recognised by people carrying on business, or generally by persons employing servants of one kind or another, that that is the law, and no doubt it is true that from time to time reasons have been found—sometimes rather eagerly sought and found—by the courts for saying that that presumption is rebutted. Nevertheless, the presumption does exist, and the law still is as it is stated to be in the passage of which SLESSER, L.J., has approved. I may add that this has been quite recently recognised by LEWIS, J., in the case which was cited to me of *Vernon v. Findlay* (2).

Mr. Fortune, however, has very properly drawn my attention to what was said by GREER, L.J., in the same case, and to the fact that SCOTT, L.J., expressed his full agreement with the judgment of GREER, L.J., on this part of the case. GREER, L.J., after saying, at p. 252, that he agreed with the observations of POLLOCK, C.B., in *Fairman v. Oakford* (3) when he said that there is no inflexible rule that a general hiring is a

hiring for the year, dealt fully with *Buckingham v. Surrey & Hants Canal Co.* (4), which was decided in 1882. That last was a decision of a Divisional Court consisting of GROVE and MATHEW, JJ., affirming the view which had been taken by HUDDLESTONE, B. For long, I think, that decision has been regarded as correct, and I notice that a Divisional Court consisting of DARLING, AVORY and HORRIDGE, JJ., in 1919 in *Cayme v. Allan, Jones & Co.* (5) took the same view of the law, and HORRIDGE, J., in his judgment appears to have based his view largely upon *Buckingham v. Surrey & Hants Canal Co.* (4). Undoubtedly, then, when GREER, L.J., says—as he does say clearly enough—in his judgment that he thinks that the presumption which was applied to the engagement of an engineer at £500 per annum in *Buckingham's* case (4) ought not to have been so applied, that is a very serious statement for the consideration of any court dealing with that presumption.

I have considered the judgment in the Court of Appeal, and I have come to the conclusion that neither GREER, L.J., nor SCOTT, L.J., intended to say that there was no longer any such presumption. Nor, I think, did they, or either of them, intend to say that the presumption applied only to contracts for the employment of agricultural labourers. I think that the complaint of GREER, L.J., about the decision in that case is that the judge had directed the jury, and the Divisional Court affirmed that view of the law, that, unless, where there was a yearly hiring, evidence of custom was given to rebut the case of a yearly hiring, a jury must find that there was a yearly hiring. I think that what GREER, L.J., intended to say was that there might be many circumstances which would rebut the presumption apart from the question whether or not a custom was proved, which would show that a yearly hiring could not be intended. It would appear that, having read the facts in *Buckingham's* case (4), GREER, L.J., felt that a jury either ought to have found, or well might have found, that there was not a hiring for a year, but I do not think that either GREER, L.J., or SCOTT, L.J., would have differed from the statement of the law read by SLESSER, L.J., from HALSBURY'S LAWS OF ENGLAND and approved in terms by him.

It is to be observed that SLESSER, L.J., agreed with the other members of the court on the part of the case to which that quotation was relevant that it was unnecessary to go beyond the statement of the law in HALSBURY'S LAWS OF ENGLAND in order to come to the conclusion to which the court did come. Even if GREER and SCOTT, L.JJ., meant that they thought that *Buckingham's* case (4) was wrong, and ought not in future to be followed, I am not sure (though I express no concluded opinion upon that) that, upon the ordinary rules upon which our courts base themselves, it can be said that the Court of Appeal has decided, otherwise than by a *dictum* not essentially necessary for the decision of the case before them, that *Buckingham's* case (4) is wrong.

What I have to decide, however, is how the matter stands upon the

contract before me. I start, as I repeat now, after this digression, with a statement of the law in HALSBURY'S LAWS OF ENGLAND. I think that there is a presumption of a yearly hiring. I have to ask myself whether or not it is rebutted here. Certainly there is no custom proved which would show that the presumption does not exist here. I look
A at all the circumstances of the case, and I see nothing therein to rebut the presumption. What of the words of the contract itself? Mr. Fortune, for the defendants, argues that those words "No commission to be payable except for a complete year" show that the parties contemplated that the contract might run for less than a complete year, and so indicate
B that a reasonable notice might terminate the contract before the year had expired. I do not take that view.

One of the circumstances I take into account is that, although it sometimes happens that a man in the position of Mr. Jackson is paid commission, it is not usual. He was not, I think, a buyer, but was
C what is called a first man—or a buyer's right-hand man, as one may translate that—with, for some time, at any rate, rather more authority probably than the ordinary first man enjoys. It sometimes happens that commission is paid in such a case, but it is unusual. Here, commission is being paid. The parties provide that commission is not to
D be payable except for a complete year. It does not seem to me likely that what they intended was that a month's notice, or even a longer notice, might be given before a year had expired, so that the employee should get no commission. I do not think, reading the contract and judging from that, that one ought to assume that that was in their minds
E at all. I think that the fact that this employee is to be paid by commission calculated on a complete year rather supports the presumption of a yearly hiring, because, unless he served his year, he would not have a chance of being paid commission, and he is to be paid not only an annual salary, but also a commission, which is not only payable yearly
F but also calculated on the whole year.

I think that the difficulty suggested by Mr. Fortune is amply met in this way. It was obvious, if the parties thought about it, that they ought to provide for the possibility of the contract coming to an end before a year had passed. I have myself seen cases where, unfortunately,
G no such provision had been made, and difficulties had arisen. The plaintiff might have died before the year had expired. In that case, the contract would have come to an end, and it would have been most desirable that it should have been clear whether or not his personal representatives would have been entitled to anything for commission.
H I daresay it is extremely unlikely in this case, but such things happen sometimes, for one reason or another. The employers might have ceased to exist as an entity. The company might have gone into voluntary liquidation. I think, also, that it is important, as appears from the contract, that, in the case of illness of the plaintiff, the contract would have come to an end if he had not been fit and able to carry out

his duties. It would have come to an end, and, therefore, it was essential to make some provision for the payment of commission in those circumstances.

I think, therefore, that those words, as I have said, support, rather than rebut, the presumption. It follows that, although I have no doubt that notice could properly have been given on Aug. 7, 1936, to terminate the contract on Dec. 19, it was not possible to do what the defendants purported to do. The result is that the plaintiff, in my view, is entitled to receive, in addition, of course, to what he had earned to Aug. 7 or Aug. 8, or what was due to Aug. 8, by way of damages the salary for the period from Aug. 8 to Dec. 19 inclusive, less £8 12s., which he was able to earn in that time. He also claims damages for loss of commission. Having heard the evidence, I am satisfied that he did not lose any commission. I am quite unable to persuade myself, that, if he had been there, he would have earned commission. I do not think that I ought to give him anything more in the way of damages than £125 5s. 4d., worked out on the data which I have sufficiently indicated. For that amount, there must be judgment.

** Judgment for the plaintiff for £125 5s. 4d. and costs.*

Solicitors: *W. A. Robinson* (for the plaintiff); *Leonard Tubbs & Co.* (for the defendants).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

PAINE & CO., LTD. v. ST. NEOTS GAS & COKE CO.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
November 17, 18, 21, 24, 1938.]

Easements—Title to easement—Licence granted by proprietors of common rights to sink a well on common—Right of proprietors to make grant—Inclosure Acts dealing with common—Nuisance—Pollution of water by third party—Grantees' right of action.

The plaintiffs were manufacturers of malt extract, and for that purpose they required a large supply of pure water. Their premises and those of the defendants adjoined a common, and on this common the plaintiffs had sunk a well, from which they carried water through a defined pipe to their mill. After they had been using this well for some years, the water supply became contaminated as a result of ammonia escaping from the defendants' works, discharging into the gravel sub-soil, and, in the course of time, reaching the well on the common. The plaintiffs rested their right to the water on a so-called lease, granted in 1935 by four persons described as proprietors of common rights in, *inter alia*, the common upon which the well was situated. These four persons were not all the commoners entitled to rights over the common, but there had been a meeting of the commoners at which the request for the lease had been agreed to. The Acts relating to the common conferred no rights upon the commoners or upon any person to make wells or to allow other people to do so, or to lease rights in the soil to persons not commoners. Nor did they contain any provisions giving a number power to act in the name of the whole. It was contended by the defendants that the alleged grant was no more than a licence, un-

enforceable by the licensees as against a third party, that it did not in law create an easement, as there was no dominant tenement, and, further, that the four grantors under the alleged lease had no power under the Inclosure Acts to make any such grant:—

HELD: although the rights purported to be granted to the plaintiffs would amount to a valid easement, it was necessary for the plaintiffs to prove that the grantors had power to make the grant, and this they had failed to do.

A

[EDITORIAL NOTE. The action in respect of the disturbance of an easement is an action in nuisance, but it differs from an ordinary action of nuisance in that the existence of the easement has first to be proved. Where the title to the easement is a grant by deed, a necessary part of the proof is to show that the grantor in the deed had power to make the grant. A *profit d prendre*, on the other hand, includes the right to take something away from the servient tenement, and the dominant owner has such a possessory right as will enable him to sue in trespass or in nuisance. The defendant, therefore, cannot set up *jus tertii*; that is to say, he cannot set up the title of a third person unless he claims under such person.

B

C

AS TO ACTIONS FOR INTERFERENCE WITH EASEMENTS, see HALSBURY, Hailsham Edn., Vol. 11, p. 374, para. 659; and FOR CASES, see DIGEST, Vol. 19, pp. 184-186, Nos. 1340-1371.]

Cases referred to:

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(1) *Clore v. Theatrical Properties, Ltd., & Westby & Co., Ltd.*, [1936] 3 All E.R. 483; Digest Supp.

(2) *Race v. Ward* (1855), 4 E. & B. 702; 19 Digest 145, 997; 24 L.J.Q.B. 153; 24 L.T.O.S. 270; *subsequent proceedings* (1857), 7 E. & B. 384.

(3) *Hill v. Tupper* (1863), 2 H. & C. 121; 19 Digest 23, 91; 32 L.J.Ex. 217; 8 L.T. 792.

(4) *Dyce v. Hay (Lady)* (1852), 1 Macq. 305; 19 Digest 16, 42.

(5) *Simpson v. Godmanchester Corpn.*, [1897] A.C. 696; 19 Digest 14, 29; 66 L.J.Ch. 770; 77 L.T. 409; *affg.*, [1896] 1 Ch. 214.

(6) *Fitzgerald v. Firbank*, [1897] 2 Ch. 96; 19 Digest 196, 1497; 66 L.J.Ch. 529; 76 L.T. 584.

(7) *Aldred's Case* (1610), 9 Co. Rep. 57 b; 19 Digest 133, 904.

(8) *Coriton & Harvey v. Lithby* (1670), 1 Vent. 167; 17 Digest 14, 120.

(9) *Cooper v. Marshall* (1757), 1 Burr. 259; 11 Digest 49, 703.

(10) *Graham v. Peat* (1801), 1 East, 244; 19 Digest 505, 3635.

(11) *Ballard v. Tomlinson* (1885), 29 Ch.D. 115; 19 Digest 158, 1096; 54 L.J.Ch. 454; 52 L.T. 942; *revsg.* (1884), 26 Ch.D. 194.

ACTION for damages for alleged pollution of two wells by the defendants, and for an injunction to restrain such pollution. One of the wells was situated on a common adjoining the premises of both the plaintiffs and the defendants, and the plaintiffs rested their right to water from this well on a so-called lease dated Aug. 1, 1935. The grantors of the lease were described as being:

[the] several persons whose names are hereinafter written and subscribed as parties executing these presents being the proprietors of common rights or rights of common or pasturage in upon and over the Islands Common Islands Meadow and Hawkesden Leys Common and the several ways and roads leading to and from the same in St. Neots in the county of Huntingdon.

The lease was executed by four persons, who, it was shown, were not

all the persons entitled to exercise the rights of common. Clause 1 of the lease reads as follows:

In pursuance of the said agreement and in consideration of the yearly rent and the covenants and conditions hereinafter reserved and contained the proprietors do hereby severally and respectively so far as they lawfully may or can by these presents grant and demise first full and exclusive right and liberty to and for the company to take and use for the purpose of the undertaking of the company all the water which from time to time may be in the said well marked A on the plan annexed hereto through the covered pipe leading from the said well to the company's mill aforesaid which pipe is coloured blue on the said plan and secondly for the purpose of exercising and enjoying the right and liberty aforesaid full right and power for the company their servants and agents at any time or times to come upon the said common for the purpose of repairing and cleansing and maintaining the said well and covered pipe to hold and enjoy the said rights and liberties hereinbefore expressed to be hereby demised unto the company during the term of 11 years from May 1, 1935. . . .

The facts are fully set out in the judgment.

R. M. Montgomery, K.C., and *Arthur Capewell* for the plaintiffs.

Roland Burrows, K.C., and *H. M. Abrahams* for the defendants.

Burrows, K.C.: The plaintiffs have no right. At the highest the lease relied on is an easement, and an easement is not a possessory right, so that consequently the plaintiffs must prove their title. They claim under a grant from commoners but common of pasturage is a right *in alieno solo* (*Cooper v. Marshall* (9), at p. 265), and gives no right to grant any easement to others, nor do the statutes regulating the common do so. Moreover, the commoners are a fluctuating body, and not incorporated, and cannot acquire a freehold. Even if they had been able to do so, the estate would have vested in the Public Trustee, who was not a party to the deed. The statutes do not enable the commoners to delegate their powers. The grant cannot be a *profit à prendre*, as a grant of a right to take water can only be an easement or a licence. It is not an easement, because there is no dominant tenement, and the terms of the instrument show that it is only a licence. But a licensee has no right to sue a stranger. The plaintiffs have not shown any right which they can enforce. [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 11, pp. 269, 351, 374, 386, CHESHIRE, REAL PROPERTY, 3rd Edn., p. 266, and *Clore v. Theatrical Properties, Ltd., & Westby & Co., Ltd.* (1).]

Montgomery, K.C.: The document described as a lease is certainly a grant, and gives the plaintiffs the right to appropriate and use the water collected in the well. It is either an easement or a *profit à prendre*, and it is immaterial which it is: *Fitzgerald v. Firbank* (6). The right to take water is a right which is inherent in the possession of land. If that right has been granted, the form of the grant is immaterial. The distinction is between a revocable licence and a right not determinable at the option of the grantor. Here there is a money consideration for the grant, and, if the grant is an easement, the plaintiffs' premises are the dominant tenement. A *profit à prendre* may be granted without reference to the ownership of any property, and is not confined to a limited class of rights. *Graham v. Peat* (10) shows that possession is

sufficient to ground an action: *Ballard v. Tomlinson* (11), at pp. 119, 126. There is no reason to inquire into the validity of the deed. The freeholder had notice of, and acquiesced in, the grant by the owner of the common rights.

Burrows, K.C., in reply: Possession is a question of fact, not of title.

A A stranger can only exercise two classes of rights, *profits à prendre* and easements. There must be either an easement or a *profit à prendre* if the plaintiff is to succeed. The incorporeal rights which can be granted are a limited class: *Hill v. Tupper* (3). The owner of land can either grant the right as an easement, in which case there must be a dominant tenement, or grant a mere licence, which cannot be enforced against a third party. If the grant here is an easement, the plaintiff must prove his title and must prove that there has been a disturbance. There is no easement because there is no grant from anyone with power to make such a grant.

C GODDARD, L.J.: If a possessory right is sufficient, I should hold that there is a possessory right here.

Burrows, K.C.: Easements are not a matter of possession. Even if there is a licence coupled with an interest, the licensee can only sue his licensor: *Clore v. Theatrical Properties, Ltd., & Westby & Co.,*

D *Ltd.* (1).

GODDARD, L.J.: The plaintiffs in this case are the occupiers of certain manufacturing premises at St. Neots, in Huntingdonshire, where they carry on the business of making malt extracts, partly for human consumption and partly for industrial use. For this purpose they require an abundant supply of pure water, and they bring this action to recover damages for the pollution of two wells, referred to in the action as wells 1 and 2, for which they allege that the defendants are responsible. They also claim an injunction.

F Well No. 2 was opened on the common some 140 yds. away from the defendants' premises. All went well until 1937, when it was found that this well was also being contaminated with ammonia. Careful watch was kept upon it, and competent experts took samples at frequent intervals, when varying degrees of pollution by ammonia and nitrates were found. That polluting matter in some way escapes from the defendants' plant is, I think, clear from the condition of a well on their own premises, which was found (and this is not disputed) to be highly polluted, as also is a sump on the plaintiffs' premises which immediately adjoins the defendants' works. I do not think that

H it is necessary to set out the evidence in detail. I am convinced that a jury would find, as I do, that the pollution comes from the defendants' works. It is unnecessary for me to find how it escapes, but, considering the age of the works—some 90 years—I think that it is highly probable that the system of drainage has become defective and that there is a continuous, though small, discharge of ammonia into the gravel subsoil,

which discharge has in course of time reached the well on the common. However, this does not conclude the matter, and an interesting and difficult question is raised as to whether the plaintiffs have any right to sue in respect of well No. 2.

Mr. Burrows has contended that the most that the plaintiffs have is a mere licence, and that, as the law is that a licensee can only sue his A
licensor, and cannot sue a third party who may interfere with the
subject-matter of the licence, the plaintiffs have no claim: *Clore v.*
Theatrical Properties, Ltd., & Westby & Co., Ltd. (1). That that is the
law with regard to a licence is, I think, clear, and I have therefore to
determine the nature of the plaintiffs' interest, if any, in the well and B
in the pipe-line which brings the water to their premises. The plaintiffs
in the statement of claim rest their right to the water on a so-called
lease granted on Aug. 1, 1935, by four persons described as proprietors of
common rights, or rights of common or pasturage, in, upon, and over C
certain commons, on one of which, though there was no evidence as to
which, the well is situate. An earlier so-called lease had been granted by the
same persons to the plaintiffs in 1932, and under it the same proprietors,
as far as they lawfully could, granted and demised to the plaintiffs the
right for 7 years to go upon the land to make and afterwards maintain D
a well and two manholes, and convey the water by means of a pipe to
the plaintiffs' premises, the line of the pipe being shown on the plan.
The document of 1935 was in substitution for that of 1932, giving a term
of 11 years from May 1, 1935, at a yearly rent of £5 5s. These commons
are the subject of two private Acts. The first was an Inclosure Act, E
1770, and the second a supplementary Act of 1774. These Acts conferred
certain rights upon the commoners. Among others, the lord of
the manor appears to have common rights, which seems a curious
and anomalous position. The later Act provided for the election of
certain officers to be held on the first Wednesday in April of each year,
among them a treasurer whose duty it is to make and collect rates and F
to do certain other things in relation to the common. I do not find in
the Acts any power given to the treasurer, nor to the commoners, how-
ever, to interfere with the soil for the purpose of making wells or of
letting other people do so, nor to let rights in the soil of the common
to any persons who are not commoners. Nor is there any provision in G
either Act, as far as I know, for the appointment of any committee of
commoners, nor any power for a number to act in the name of the whole.
What happened in fact was that at a meeting on the first Wednesday
in April, 1932, held at the office of the treasurer, who is a solicitor in
practice at St. Neots, at which, be it observed, the lord of the manor H
(who, as I have said, also holds several common rights) was present,
the plaintiffs applied for permission to make this well. Those of the
commoners who were present gave the permission, the lord of the manor
being one who assented, and so the first so-called lease came to be drawn.
After the well had been made and the plaintiffs had been drawing water

from it for two or three years, the second so-called lease was applied for at the statutory meeting in 1935. By this time, the son of the former lord of the manor had succeeded, and he was represented at the meeting by his agent, who, with the commoners present, agreed to the request. Whatever this document is, it is not a lease. There is no demise of anything. It is a grant of something, or, rather, it purports to be. When I asked Mr. Montgomery what he said was granted in law, he said that it granted a right, but what sort of right he seemed a little reluctant to tell me. What I think it purports to grant is a right to make and maintain a well for the purpose of gathering water, together with the right to lead that water to the plaintiffs' factory. Water cannot be the subject of a *profit à prendre*. *Race v. Ward* (2) and *Hill v. Tupper* (3) show that a new species of incorporeal hereditament cannot be created at the will and pleasure of the landowner, though no doubt a deed purporting to make such a grant may have effect as a licence. What I think this document does purport to create is an easement to make and maintain a well in which to gather water, which is to be conveyed by a pipe to the plaintiffs' hereditament in the town. It is no doubt more than a mere easement of a watercourse, for the water has first to be gathered, but it is not the law that every easement must be one hitherto recognised by law, such as light, air, or a watercourse: *Dyce v. Hay (Lady)* (4) and *Simpson v. Godmanchester Corpn.* (5). Mr. Burrows argued that there could be here no easement, as there was no dominant tenement. He said that the grant was to use the water, not at the plaintiffs' hereditament, but in their business. That, I think, is not the true construction. The water is to be taken to the plaintiffs' mill through a defined pipe, both the mill and pipe appearing on the plan annexed, and the reference to the plaintiffs' business only shows, in my opinion, that the supply is for manufacturing purposes, and not, as might otherwise have been contended, for domestic purposes. Therefore one finds a dominant and a servient tenement in different ownership—a grant of something beneficial to the dominant tenement and something given which can be the subject of a grant—and that combination makes, in my opinion, a valid easement.

The difficulty which now arises is as to what right the four people who signed the agreement had to make any grant at all. Even assuming that these proprietors have rights greater than those of ordinary commoners, I can find no right in them to dig wells, much less to grant rights over them to non-commoners, nor do I find anything which permits certain of the commoners to act on behalf of all. The deed, therefore, appears to me to confer on the plaintiffs no title to anything. Mr. Montgomery argued that he had at least a possessory title, and he relied mainly on *Fitzgerald v. Firbank* (6). That case no doubt shows that a person who is in actual enjoyment of a *profit à prendre* can maintain an action of trespass against a person who disturbs him in his enjoyment, but I can find no case where a person, who sues to protect an easement,

either in trespass or case, has not had to prove as part of his case the right to the easement. In reason, it must, I think, be so. If a man sues to protect the easement of support to his house, it is not enough to prove that he is in possession of the alleged dominant tenement. He must prove that the right to support has been acquired. So, too, if the owner of Blackacre complains that his right of way over Whiteacre has been obstructed by some person, he must prove that he has a right of way. He is *ex hypothesi* not in possession of Whiteacre over which he claims the right. His possession of Blackacre gives him no *prima facie* right at all. It is true that it appears from the old cases that he was not called upon to plead his title to the easement, but would declare generally "that he was entitled," whether he was suing the owner of the alleged servient tenement or a mere wrongdoer: *Aldred's Case* (7) and the notes to *Coriton & Harvey v. Lithby* (8). At the trial, however, I have no doubt that he had to prove that he was entitled, if it were put in issue.

I ought to add that at the trial my attention was not directed in detail to the provisions of the Inclosure Act of 1770. I have since looked at it, and it seems to me that difficult and complicated questions as to the freehold rights may arise if they have to be determined. As I have said, there was no evidence as to the precise part of the common on which this well was situate—I mean as to which part of the Enclosure Act applied to it—and it appears to me that different persons may have different rights over the various parcels referred to in the Acts.

The result is that the plaintiffs have failed to prove any rights in the well which can be protected by injunction, nor do they show any right which has been violated so as to give them a claim for damages against these defendants. The action fails, and is dismissed. The defendants will have the general costs of the action, but the plaintiffs will have the costs of the issue as to whether the pollution of the water was due to the defendants' works, the two sets of costs to be set off.

Action dismissed.

Solicitors: *Lovell, White & King* (for the plaintiffs); *Crossman, Block & Co.*, agents for *Wade-Gery & Brackenbury*, St. Neots (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

BUSH v. BUSH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
November 29, 30, 1938.]

Divorce—Desertion—Previous proceedings for divorce abandoned—Whether period of desertion continues to run—Matrimonial Causes Act, 1937 (c. 57), s. 6.

A husband deserted his wife on Dec. 5, 1933. On June 5, 1936, exactly 2½ years after the date of the desertion, the wife presented a petition for divorce founded on adultery. The petition was not pro-

ceeded with, and was ultimately dismissed at the instance of the wife on Feb. 18, 1938. The wife then, on Mar. 24, 1938, presented a petition for divorce founded on desertion for more than 3 years immediately preceding the presentation of the petition:—

HELD: the period during which the first petition was on the files of the court could not be included in the period of desertion, and the wife had, therefore, failed to establish desertion for more than 3 years immediately preceding the presentation of the petition.

Johnson v. Johnson (5) considered.

[EDITORIAL NOTE.] The judgment herein considers all the recent cases upon the interruption of a period of desertion by the presentation of a petition either for judicial separation or for divorce. The decision in *Johnson v. Johnson* (5) is a little difficult to reconcile with the others, and, although the facts here are not quite in point with those in *Johnson v. Johnson* (5), the reasoning upon which that decision was based is not accepted.

AS TO EFFECT OF PETITION ON DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 658, 659, paras. 968, 969; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

C Cases referred to:

- (1) *Stevenson v. Stevenson*, [1911] P. 191; 27 Digest 320, 2986; 80 L.J.P. 137; 105 L.T. 183.
- (2) *Kay v. Kay*, [1904] P. 382; 27 Digest 308, 2850; 73 L.J.P. 108; 91 L.T. 360.
- (3) *Harriman v. Harriman*, [1909] P. 123; 27 Digest 321, 2995; 78 L.J.P. 62; 100 L.T. 557.
- (4) *Marthews v. Marthews*, [1938] 4 All E.R. 377; Digest Supp.
- (5) *Johnson v. Johnson*, [1938] 3 All E.R. 765; Digest Supp.; 159 L.T. 489.

UNDEFENDED PETITION by wife for dissolution of the marriage on the ground of desertion. The facts are fully set out in the judgment.

B. Stuart Horner for the petitioner.

SIR BOYD MERRIMAN, P.: In this case, the wife is petitioning for divorce on the ground that her husband has deserted her for a period of at least 3 years immediately preceding the presentation of the petition. The petition, which is dated Mar. 21, 1938, was in fact presented on Mar. 24, 1938. She has therefore to satisfy the court that her husband had deserted her for 3 years immediately preceding Mar. 24, 1938.

The parties were married in 1919. I need go through none of the early history. It is sufficient to say that by Nov., 1933, the husband, who by that time had begun to neglect his wife, demanded a separate room, and plainly indicated to her that he was tired of her and wanted no more to do with her. On Dec. 5, 1933, he deserted his wife. The date can be fixed with precision by a telegram which he sent on that date. Subsequent correspondence shows that he maintained the same attitude, and I am quite satisfied in my own mind that, so far as his intention was concerned, it has remained unchanged ever since.

The difficulty in this case, however, is that on June 5, 1936, which is exactly 2½ years to the day from the date when the wife was deserted, she presented a petition for dissolution of marriage on the ground of her husband's adultery with a woman who was living in the same house as he was. That petition remained on the file of this court until Feb. 18,

1938, when it was dismissed at the instance of the wife, in order to make way for the present petition. Mr. Horner, who has argued this case very clearly and forcibly, has told me that that petition was not proceeded with because the wife was advised that, suspicious as the circumstances were, it would not be possible to invite the court to find adultery on the evidence that was available to the petitioner. Nevertheless, the fact A remains that from June 5, 1936, to Feb. 18, 1938, she had a petition on the file of the court praying that her marriage might be dissolved on the ground that her husband was living in adultery with this particular woman. It follows from what I have said that, before the presentation of the present petition, only one month and a few days had elapsed after B the earlier petition was dismissed. Therefore, unless the wife can ignore the petition which she herself presented, or, rather, unless she can ignore the fact that for the time I have mentioned this petition was on the file of the court, she cannot make up a period of 3 years, continuous or otherwise. The desertion, as I have said, had lasted exactly $2\frac{1}{2}$ years before C this petition, and one month and a few days after her petition was dismissed. She has, therefore, to seek to include in the period of desertion alleged the time when her petition for dissolution was upon the file.

Mr. Horner has given me the benefit of an elaborate review of the authorities. I reminded him early in the argument that two of my D brethren had recently given judgments on this point following the decision of the Court of Appeal in *Stevenson v. Stevenson* (1). In *Stevenson v. Stevenson* (1), after a corresponding review of the authorities, SIR H. H. COZENS-HARDY, M.R., said, at p. 194 :

At the date of the petition there had not been desertion for 2 years, such as is E required by the statute. The desertion had lasted 18 months only. The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away.

I am not oblivious of the fact that that was a case in which the petition referred to had been a petition for judicial separation, but it seems to me F that the case of a petition for dissolution is *a fortiori*. There the spouse is petitioning, not merely that the other spouse shall keep away, but also that the marriage itself shall be dissolved, and Mr. Horner does not dispute that, in a petition for dissolution based upon an allegation of adultery, it would be a contempt of court which could be prevented if G the other spouse, after the presentation of the petition, tried to force himself or herself into the matrimonial home in order to get, for example, a condonation of the adultery. Moreover, in the judgment of the Court of Appeal to which I have just referred, pointed approval is given to the judgment of GORELL BARNES, J., as he then was, in *Kay v. Kay* (2), H where, even if his remarks were *obiter* in relation to the facts of that case, he dealt expressly and in terms with the case of a presentation of a petition for dissolution based upon adultery. Whether or not that passage in the judgment was *obiter* in the circumstances of the case, it has, as I say, received the express approval of the Court of Appeal.

In those circumstances, it would be manifestly idle for me to indulge in a review of passages in other judgments—notably the passages in the judgments of BUCKLEY and VAUGHAN WILLIAMS, L.JJ., in the decision of the full Court of Appeal in *Harriman v. Harriman* (3). It is sufficient to say that the passages referred to, and, in particular, the judgment of A BUCKLEY, L.J., at p. 148, were in marked contrast to passages on the same point in the majority of the judgments, and received no approval whatever when the matter was discussed again in the argument in *Stevenson v. Stevenson* (1).

Moreover, as I have already said, LANGTON and HENN COLLINS, JJ., B have both considered this point quite recently in view of the decision in *Stevenson v. Stevenson* (1). Even if I did not agree with these two judgments, one of which was delivered after consideration, and the other in the light of the judgment of LANGTON, J., in *Marthews v. Marthews* (4), I should have very great hesitation in differing from them. In fact, C however, I entirely agree with both of them, and it is quite plain that, so long as the decision in *Stevenson v. Stevenson* (1) stands, this court is bound to hold that it is impossible for a wife to allege that desertion continues during the period in which she herself is presenting a petition for dissolution on the charge of adultery. It is, therefore, impossible to D accede to the argument that the whole of this period can be counted continuously from Dec. 5, 1933, up to the presentation of the present petition, ignoring the 20 months, or thereabouts, during which the wife herself had a petition for dissolution on the file of the court.

I wish to say only one other word. Mr. Horner referred me to the judgment in *Johnson v. Johnson* (5). I am not satisfied that the reasoning in that judgment, based upon the Matrimonial Causes Act, 1937, s. 6, is sound. I think that that section is dealing with an entirely different subject-matter, and that it is not possible to deduce from express provisions, designed to meet the case where a judgment of this court or of a F court of summary jurisdiction has been given, any conclusion as to the effect of the mere presentation of a petition. In my view, the Matrimonial Causes Act, 1937, has not altered the law as to the presentation of a petition as laid down by *Stevenson v. Stevenson* (1). It may be that in a proper case the question whether, there having been a complete period of G desertion, as in *Johnson v. Johnson* (5), before a petition is presented, and a period of desertion after the dismissal of the petition, it is possible, so to speak, to add the two together, in order to get a cumulative period of 3 years and upwards which continues down to the presentation of the petition, may have to be considered in due course. However, that is not H this case, because, as I have already said, even on that method of approach, the wife cannot make up a period of 3 years, continuous or otherwise. For those reasons, I am obliged to dismiss this petition.

Petition dismissed.

Solicitor : *Edgar H. Hiscocks* (for the plaintiff).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

**Re HORLICK'S SETTLEMENT TRUSTS, COLLEDGE v.
HORLICK.**

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.J.J.),
November 24, 25, 1938.]

Rentcharges and Annuities—Annuity to married woman—Free of tax—"And of every other tax on income for the time being in force"—Sur-tax—Amount of sur-tax to be provided. A

By a settlement made in consequence of a divorce, the settlor covenanted that he or his personal representatives would pay to trustees in trust to pay to his divorced wife annually "such sum as after deduction of income tax at the standard rate for the time being in force and of every other tax on income for the time being in force shall leave a clear sum of £4,000." The lady had subsequently remarried, and the settlor died:— B

HELD: the executors of the settlor were bound to provide a sum sufficient to discharge the income tax in respect of the annuity and such proportion of the total sur-tax payable by the annuitant as the sums upon which she is from time to time assessed to sur-tax in respect of the said annuity bear to the total amount of the assessment of the joint income of the annuitant and her husband for the purpose of sur-tax. C

Decision of FARWELL, J. ([1938] 2 All E.R. 553) affirmed.

[EDITORIAL NOTE.] No question here turns upon the provision of the income tax. The question is whether the words used in the settlement render the settlor and his personal representatives liable to pay any, and, if so, what, sum in respect of sur-tax. As to this, it has been held that the words are sufficient to include sur-tax and the amount must be the actual amount of sur-tax charged in respect of the annuity, however that charge may be increased by other income of the annuitant or of her husband. D

AS TO SUR-TAX ON ANNUITIES, see HALSBURY, *Hailsham Edn.*, Vol. 28, pp. 215, 216, para. 387; and FOR CASES, see DIGEST, Vol. 39, p. 168, Nos. 588-592.] E

Cases referred to :

- (1) *Re Crawshay, Crawshay v. Crawshay* (1915), 60 Sol. Jo. 275; 39 Digest 167, 582.
- (2) *Re Bowring, Wimble v. Bowring* (1918), 34 T.L.R. 575; 39 Digest 168, 593. F
- (3) *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240; 39 Digest 168, 589; 89 L.J.Ch. 145; 122 L.T. 462.
- (4) *Re Dozat, Dozat v. Dozat* (1920), 125 L.T. 60; 39 Digest 168, 590.
- (5) *Re Bowen, Paddock v. Bowen* (1925), 70 Sol. Jo. 44; 39 Digest 168, 592.
- (6) *Re Bates, Selmes v. Bates*, [1925] Ch. 157; 39 Digest 168, 591; 94 L.J.Ch. 190; 132 L.T. 729. G
- (7) *Re Reckitt, Reckitt v. Reckitt*, [1932] 2 Ch. 144; Digest Supp.; 101 L.J.Ch. 333; 147 L.T. 275.
- (8) *Re Armaghdale (Lord), Craig v. Armaghdale (Lady)* (1928), 44 T.L.R. 239; Digest Supp.
- (9) *Fleetwood-Hesketh v. Fleetwood-Hesketh*, [1929] 2 K.B. 55; Digest Supp.; 98 L.J.K.B. 417; 141 L.T. 317. H
- (10) *Baird's Trustees v. Baird*, [1933] S.C. 553; Digest Supp.
- (11) *Richmond's Trustees v. Richmond*, [1935] S.C. 585; Digest Supp.

APPEAL by the personal representatives of Sir E. Horlick from an order made by FARWELL, J., dated May 2, 1938, and reported [1938]

2 All E.R. 553, where the terms of the summons, and the facts, are fully stated.

F. R. Evershed, K.C., and *A. C. Nesbitt* for the appellants, the personal representatives of Sir Ernest Horlick.

Hon. Charles Romer, K.C., and *Sir Hugh Lucas Tooth* for the respondent, A Lady Oppenheimer.

Roger W. Turnbull for the trustees.

Evershed, K.C. : There is a liability to pay sur-tax, but, having regard to the form of words used, and also having regard to other passages in the settlement, the obligation is one which is to be arrived at objectively by a mathematical formula. If the court is against the appellants on that, the words used are not appropriate to impose any obligation to pay sur-tax at all. The sur-tax payable is not a sur-tax payable upon an outside income, but is to be arrived at upon a mathematical formula with regard to a fixed income. If there was a direction in a will to pay such a sum without deduction for income tax, sur-tax would not be included. The difficulty in the present case is that the language treats the sur-tax as something which has nothing to do with the actual income of the annuitant. The obligation to pay cannot be dependent upon the income of a future husband. What is contemplated in this case is the working out of a sum which will fix with certainty, and without having regard to outside considerations, the particular figure covenanted to be paid. There is an absence of any words which limit the tax to be deducted. If that is wrong, there is no obligation to pay this tax at all. Only the individual is liable to be taxed, and trustees are not liable in the matter. There is authority for saying that a covenant to pay a sum after deduction of tax cannot apply to a tax which is not deducted. [Counsel referred to *Re Crawshay, Crawshay v. Crawshay* (1), *Re Bowring, Wimble v. Bowring* (2), *Re Crosse, Oldham v. Crosse* (3), *Re Doxat, Doxat v. Doxat* (4), *Re Bowen, Paddock v. Bowen* (5), *Re Bates, Selmes v. Bates* (6), *Re Reckitt, Reckitt v. Reckitt* (7), *Re Armaghdale* (Lord), *Craig v. Armaghdale* (Lady) (8), *Fleetwood-Hesketh v. Fleetwood-Hesketh* (9), *Baird's Trustees v. Baird* (10) and *Richmond's Trustees v. Richmond* (11).]

Romer, K.C. : The deed is not a very clearly drawn document. There are indications that income tax rather than sur-tax was in the minds of the parties. On the other hand, cl. 1 (a) contains words that can only mean that sur-tax was intended to be paid in addition to income tax. Sir Ernest Horlick was sufficiently wealthy to have formed an acquaintance with sur-tax with regard to his personal affairs, and in this deed he was making provision for his wife and children. It is abundantly plain from the language used that the settlor was intending to make a wider provision for his wife than he was for his daughter. It is true that in cl. 1 (a) he has not said income tax and sur-tax, but the words must include the tax with which he was himself so familiar. No reasonable construction could be put upon these words which would exclude sur-tax. The words "after deduction" can be used to mean

such a sum as will remain after deduction by the covenantor of such a sum as he was entitled to deduct. Income tax is not a deduction which could be made by the covenantee. If, in fact, there is an association of the word "deduction" with the word "tax," the court would hold that income tax was included in deductions as in *Re Crawshay, Crawshay v. Crawshay* (1). The contract may show an intention to treat sur-tax as a deduction, and, if so, one comes to the conclusion that the word was used in its arithmetical sense. An instance of that is *Re Doxat, Doxat v. Doxat* (4). The covenantor did not want to bind himself down by the name, but only by the character, of the tax—namely, "every other tax on income for the time being in force." In *Re Reckitt, Reckitt v. Reckitt* (7), ROMER, L.J., says that in his opinion it is clear that income tax includes sur-tax. From the date of the execution of this deed until the date of his death, Sir Ernest Horlick paid sur-tax as well as income tax on this annuity. [Counsel referred to *Re Crosse, Oldham v. Crosse* (3).]

Tooth: It is provided by cl. 1 (a) of the deed that the settlor shall pay a gross sum. He covenants to pay £4,000 per annum, and a certain sum for income tax, and, in addition, whatever may be provided for by the disputed words. Three separate payments are implied in the covenant.

Evershed, K.C., in reply: There is nothing fantastic or unreasonable in making provision for further taxes on income. The settlor had in mind the position between the covenantor and the covenantee. As between these two persons, a clear sum is to be paid over. It is said that the word "deductions" can be used in more senses than one. It may refer to the deduction which may be made by the covenantor before making payment to the covenantee or it may mean a mathematical deduction. It cannot, however, mean one thing in one place and another thing in another place. The settlor had in mind the position between covenantor and covenantee, and not that between the Crown and the taxpayer. [Counsel referred to *Re Crosse, Oldham v. Crosse* (3) and *Re Reckitt, Reckitt v. Reckitt* (7).]

SIR WILFRID GREENE, M.R.: This appeal raises a question of construction of a settlement dated Aug. 19, 1930, between the late Sir Ernest Horlick, his then wife, now Lady Oppenheimer, and certain trustees. The question is whether or not under a certain covenant in that deed the sum there covenanted to be paid is, to use a popular but convenient expression, free of sur-tax as well as income tax. I need not read the various paragraphs which bear upon the question, but the first observation to make is that, but for the presence of certain words in cl. 1 (a), the scheme of the deed would throughout, I think, be a consistent one, and would provide, and provide with reasonable clearness and efficiency, for the payment of a net annuity free of income tax. The phraseology used is convenient for that purpose.

There are introduced into cl. 1 (a) of the settlement, however, certain

words which give rise to the present question. I will read the relevant part of that clause, which is as follows. It is a covenant to

pay to the trustees in trust for Lady Horlick such a sum as after deduction of income tax at the standard rate for the time being in force and of every other tax on income for the time being in force shall leave a clear sum of £4,000.

- A As I have said, if it was not for the words "and of every other tax on income for the time being in force," the deed would be in accordance with a familiar precedent which provides for payment of annual sums free of income tax. Such a provision cannot be made in the same way in a deed as it can in a will, and, therefore, a formula has been invented, and
- B has been familiar for many years. Instead of covenanting to pay the annuity free of income tax, the covenant is to pay such a sum as, after the deduction of tax, will leave the net sum desired. That is the formula which has been adopted here. Taking the words "and of every other tax on income for the time being in force" by themselves, in relation to
- C the phrase "income tax at the standard rate," I should have thought that those words, whatever else they may include, were amply sufficient to include sur-tax. It is perfectly true that, if the word "other" in "every other tax on income" is taken in contra-distinction to "income tax at the standard rate," there is some slight inaccuracy of expression,
- D because sur-tax is not a tax "other than income tax," nor is it really a tax "other than income tax at the standard rate," because income tax and sur-tax are the same tax, sur-tax being merely a deferred instalment of income tax, but I do not think myself that this really has any force.

- On that provision, therefore, I should have come to the conclusion
- E that the phrase "and of every other tax on income for the time being in force" would include sur-tax. However, any such conclusion must be provisional only, because the context requires to be examined to see whether there is anything in that context which points to a different construction of the words.

- F There are certain provisions in the context which are relied upon. First of all, in the immediate context—that is to say, in part of the phrase itself—there is this. It is said that the use of the words "after deduction" at the beginning of the phrase points to the fact that the intention is to deal only with taxes in respect of which there is a legal
- G right of deduction of tax, and upon that footing the words "and of every other tax on income for the time being in force" would be confined to taxes on income in respect of which a covenantor is entitled to make a deduction upon payment. That there are no such other taxes, and that it is difficult perhaps to think of any such taxes, is not in itself conclusive,
- H but it would be a rather curious limitation of a phrase which in itself is sufficient to cover sur-tax if it was intended to exclude from the operation of that phrase one known tax and to include possible unknown taxes, such as those which I have mentioned. It seems to me that the argument on the word "deduction" is really based on a misconception. It is perfectly true, no doubt, that the formula was invented in view of the

permissible deduction under the Income Tax Acts. Nevertheless, in a covenant of that kind, where the only right of deduction is in respect of income tax at the standard rate, the covenant is, and necessarily is, a covenant to pay a gross sum. The word "deduction" is introduced as a convenient means of calculating the gross sum and the net sum. You cannot in a deed covenant to pay an annuity of £4,000 free of income tax, and, therefore, you must covenant to pay, if you wish to achieve the same result, a sum not mentioned in figures, but such a sum as, if you were to deduct income tax from it, would leave the net sum which you specify. In other words, the phrase "after deduction of income tax," in my judgment, really refers to that mathematical calculation, and, accordingly, if this clause had run "after deduction of income tax at the standard rate and sur-tax," I should have found nothing in the use of the word "deduction" in the context which would have been in any way anomalous or inconsistent. It appears to me that it would have been a perfectly proper phrase to use to describe that mathematical calculation which is to be made in order to arrive at the sum which, when all relevant taxes have been subtracted from it, will produce a clear sum of £4,000. I therefore find nothing in the word "deduction" which would justify me in construing the words "and of every other tax on income for the time being in force" in the limited sense desired.

There are certain other provisions in the more remote context of the deed upon which reliance is placed. First of all, it is said that, as regards the provision in the second half of cl. 1 (a) in favour of the two children of the marriage, upon the construction which I am provisionally accepting and testing, there would be insuperable difficulties in working that latter part of the clause. It is, no doubt, true to say that that part of the clause is one which would work perfectly easily and smoothly if "income tax at the standard rate" were alone in question, and it is perfectly true to say that the introduction of sur-tax does introduce, in the case of the covenant in favour of the two children, certain problems and difficulties. In my judgment, however, those problems and difficulties, which will have to be surmounted if and when the question arises as to the rights of the children, are not such as to justify the court, either alone or in conjunction with the other matters relied upon, in placing upon words which, to my mind, have a clear *prima facie* meaning sufficient to include sur-tax, a more limited application.

There were two points suggested with regard to the children, and I mention them to show that I have them in mind. It is said, first of all, that there are impossibilities in the mathematical calculation involved, and, secondly, that, if the two children had equal incomes, and one of them was liable to sur-tax and the other was not, the result would be that the one not liable to sur-tax would be receiving under this covenant part of the sur-tax element in the covenanted sum which is put there for the benefit of the other. That may or may not be so. When the court has to construe that, it will have to deal with those problems, but I am

certainly not going to allow difficulties of that kind to cut down language which appears to me to be clear, and to have been inserted for none other than its ostensible purpose.

The other matter which is relied upon is cl. 1 (c). It is pointed out that the security is limited to payment of the annual sum of £4,000, and not
A to the gross sum covenanted to be paid, and, in particular, not to the gross sum of £4,000 together with the added element relating to sur-tax. I observe that, of course, the sum which the covenantor covenants to pay to the trustees under cl. 1 (a), if sur-tax is included, is a sum of £4,000 plus the sur-tax element in the gross figure, because the only
B sum the covenantor can deduct when he performs his covenant is the element in the gross figure which is referable to "income tax at the standard rate." Having deducted that, his obligation will be to pay over a sum made up of the £4,000 plus the sur-tax element. That will be passed on by the trustees to Lady Oppenheimer, out of which she
C may or may not, as she pleases, satisfy her liabilities to the revenue for sur-tax. However, bearing that in mind, when one comes to look at sub-cl. (c), it is perfectly just to point out that the only thing which is to be secured under that subclause is that annual sum of £4,000. It would apparently exclude, therefore, what I have called the sur-tax element
D in the gross figure. There again, that is a defect in a piece of machinery in the deed which I do not find so compelling as to justify me in putting upon the words in dispute the construction which is desired.

In passing, I should have mentioned subcl. (b), which provides that the sum is to be paid in advance by equal quarterly payments. It was pointed
E out, and pointed out with truth, I think, that that cannot be strictly complied with in the case of sur-tax, because it would not necessarily be known what the amount of the sur-tax element in the gross sum would be, and, therefore, it could not be divided into four equal quarterly payments. There again, it seems to me that the result on that argument is that, if
F that state of affairs exists in respect of any quarter, the proper way of performing the covenant, and the only way in which it can be performed in respect of that particular quarter, is by immediate payment of the quarter of the net sum, and the remainder of the actual amount which falls to be paid can only be paid when the liability is ascertained. In
G other words, it is a present liability, but, by its nature, it can only be ascertained at some future date. I do not myself see any particular practical difficulty in giving effect to that clause.

Reliance was also placed on subcl. (e), which enables the settlor to obtain the release of his securities which were deposited on payment of
H such a capital sum as will at the time of such payment produce by its income after the deduction of income tax and such other taxes on income as aforesaid the clear annual sum of £4,000.

There again, it is said, that sum cannot be calculated at any given time, because, until an assessment of sur-tax has been made upon Lady Oppenheimer, it is impossible to know what the liability is. That, again,

is an argument relating to a piece of machinery in this deed, which does not impress me.

On the other hand, attention is called to a point which I think is of significance, and it is this. In cl. 6 (a), the settlor enters into a covenant to pay to Lady Oppenheimer in trust for one of the children, Elizabeth, in every year until she attains the age of 21 years :

such a sum as after deduction of income tax at the standard rate for the time being shall leave a clear sum of £500.

That covenant is confined to income tax at the standard rate, and, when it is compared with Lady Oppenheimer's covenant in cl. 1 (a), "and of every other tax on income for the time being in force," the settlor obviously is drawing a distinction, and a distinction which presumably was intended to have some result, between the case of Lady Oppenheimer's annuity and the case of Elizabeth's annuity. It seems to me that this is a confirmation of what I think is the *prima facie* ordinary meaning of the words in question, and is to be put into the scales and weighed against the other considerations which I have mentioned. Taking the whole matter and regarding the deed as a whole, I come to the conclusion that the judge's construction of the words in question was right, and that the covenant does provide for the case of sur-tax.

The other question that arises is in what way the amount of the sur-tax element in the covenanted sum is to be arrived at. The importance of that lies in the circumstance that, Lady Oppenheimer having remarried, and her husband being a man of substantial means, the rate of sur-tax which she has to pay is arrived at by taking her present husband's income into account. That, of course, imposes a serious burden on the personal representatives of Sir Ernest Horlick, and it is argued that, upon the true construction of this deed, the only sur-tax which is to be introduced into the covenanted sum is to be sur-tax upon the footing that the sum of £4,000 plus income tax upon it is to be treated as being the sole income of Lady Oppenheimer. In other words, for the purpose of the covenant, this is to be treated, so to speak, as an income by itself, and the sur-tax to be brought into account is the sur-tax which would be payable if that were the sole income of Lady Oppenheimer. I need say no more with regard to this than that I agree with the judge in rejecting an argument which appears to me to be not only not consistent with the language used but also highly artificial, and to have the disadvantage that it does not accord with a very sound principle, which has been adopted in more cases than one in the past, and which solves this particular difficulty.

The judge held on this point—to take the actual language of his order : . . . the sur-tax so to be provided ought to be such proportion of the total sur-tax payable by Sir Francis and Lady Oppenheimer as the sums upon which Lady Oppenheimer is from time to time assessed to sur-tax in respect of the said annuity bear to the total amount of the assessment of the joint income of Sir Francis Oppenheimer and Lady Oppenheimer for the purpose of sur-tax.

It is not suggested that, if the argument which I am at present considering

is rejected, the finding of the judge can be called into question. I have no hesitation in rejecting that argument, and I agree with the judge's order in respect to both matters. In the result, the appeal must be dismissed.

SCOTT, L.J. : I agree.

A CLAUSON, L.J. : I agree with the reasons which have been given by
SIR WILFRID GREENE, M.R., for dismissing this appeal. In my view,
the judgment of the judge, and the reasons he has given for it, are in every
respect accurate and correct. There is only one thing I would wish to
mention as a matter of precaution. It is just conceivable, although I
B should think not very likely, that at some time in the future the question
of the construction of cl. 1 (c) as to the extent of the security provided by
that clause might possibly be brought into question. Of course, although
it has been necessary to comment on that clause, as well as other clauses,
I would not have it supposed, as far as I am concerned, that I have come
C to any conclusion in any shape or form as to the exact extent of the
security intended to be provided by that clause. The point is possibly
one of some difficulty, but I do not suppose it is at all likely that the
point will be taken.

D SIR WILFRID GREENE, M.R. : Perhaps I should add as a rider to my
judgment that nothing that I have said must be taken as expressing any
concluded opinion on the construction of cl. 1 (c), or as expressing any
opinion which can properly be cited by anybody in any future litigation
which may arise with regard to the meaning of that clause.

E SCOTT, L.J. : I agree with what both my brothers have said, and I
also agree with the rider.

Appeal dismissed with costs.

Solicitors : *Markby, Stewart & Wadesons* (for the appellants) ; *Baileys,*
F *Shaw & Gillett* (for the respondent and the trustees).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

G LAYCOCK (INSPECTOR OF TAXES) *v.* FREEMAN, HARDY
& WILLIS, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore,
L.JJ.), **December 1, 2, 1938.**]

H *Income Tax—Trade—Succession to trade—Wholesale manufacturing trade
carried on by subsidiary company—Taken over by retail company—Income
Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 11 (2).*

Up to Apr. 1, 1935, the respondent company owned two subsidiary
companies which carried on the business of the manufacture and the
wholesale sale of boots and shoes, which the respondent company sold
by retail in its shops. The subsidiary companies sold the whole of their
output to the respondent company. On Apr. 1, 1935, the two sub-
sidiary companies were wound up, and thereafter the respondent com-

pany carried on the manufacture of boots and shoes in the works which had belonged to these companies as departments of its business:—

HELD: the trade of the subsidiary companies ceased on Apr. 1, 1935, to be carried on as a trade, and became merged in the different business of the respondent company. There was, therefore, no succession within Sched. D, Cases I and II, r. 11 (2), to the trade of the subsidiary companies by the respondent company.

Decision of LAWRENCE, J. ([1938] 3 All E.R. 571) *affirmed*. A

[EDITORIAL NOTE. The subsidiary companies were carrying on a wholesale trade, whereas the respondent company carried on a retail trade. The merger of such companies is not a succession within the rule, since the precise trade carried on by the company which has been wound up is not carried on by the other company as that trade, but as part of a different trade. B

AS TO SUCCESSION TO A BUSINESS, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 111-113, para. 209; and FOR CASES, see DIGEST, Vol. 28, pp. 40-42, Nos. 208-214.]

Cases referred to:

- (1) *Watson Brothers v. Lothian* (1902), 4 Tax Cas. 441; *sub nom. Watson Brothers v. Inland Revenue* (1902), 4 F. (Ct. of Sess.) 795; 28 Digest 41, case 1. C
- (2) *Bell v. National Provincial Bank of England*, [1904] 1 K.B. 149; 28 Digest 41, 211; 73 L.J.K.B. 142; 90 L.T. 2; 5 Tax Cas. 1.
- (3) *Shipstone (James) & Sons, Ltd. v. Morris* (1929), 14 Tax Cas. 413; Digest Supp. D
- (4) *Briton Ferry Steel Co., Ltd. v. Barry*, [1938] 4 All E.R. 429; Digest Supp.
- (5) *Malayalam Plantations, Ltd. v. Clark* (1935), 19 Tax Cas. 314; Digest Supp.
- (6) *Erichsen v. Last* (1881), 8 Q.B.D. 414; 28 Digest 32, 163; 51 L.J.Q.B. 86; 45 L.T. 703; 4 Tax Cas. 422.

APPEAL by the inspector of taxes from a judgment of LAWRENCE, J., dated July 8, 1938, and reported [1938] 3 All E.R. 571. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R. E

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellant.

A. M. Latter, K.C., and John Senter for the respondents.

The Attorney-General: If there has been succession, the profits are called upon to bear tax in the year in which they arise. The present case turns upon the words "succeeds to a business." The two companies were taken over as going concerns, and the product of the factories was disposed of retail by the respondents in exactly the same manner as before. Before the fusion, there was a document of sale in transactions between subsidiary and parent companies, but after the fusion this was no longer so. The present case differs from others in that here everything went on exactly as before, the only difference being in the legal relationship. The meaning of the rules is quite clear. In the present case, the retailer, after the merger, was a manufacturer and a retailer. *Shipstone (James) & Sons, Ltd. v. Morris* (3) shows that it is not necessary that the business should be carried on in the same way before and after the merger. *Briton Ferry Steel Co., Ltd. v. Barry* (4) shows the importance of the reason. The word "trade" directs the mind to the dealings of a man with his customers. If one analyses the trade for income tax purposes, F
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it will be found that it is not merely the sale of the products, but also the purchase of raw materials. The trade ceased, so far as raw material under contract of sale was concerned, because the supplier bought his subsidiary. In *Briton Ferry Steel Co., Ltd. v. Barry* (4), no one argued that there was not a succession because raw materials were no longer obtained under contract by the appellant. Thus, in the present case, the trade has not ceased or been annihilated because the boots and shoes which are sold to the public are not purchased and sold to the retailer, since the company owns both businesses. It may be that the trade a man is carrying on may be both the retail selling and the manufacturing, but they are distinct activities, when one has to consider whether a man has succeeded to a trade which was carried on by somebody else or whether he has merely added to his own. The conflict is between a man saying he has expanded his business and the revenue saying that he has succeeded to the business of another. The profits attributable to the manufacturing should be the same as before. The rule should apply in spite of the fact that the successor to the manufacturing companies was their sole customer. [Counsel referred to *Malayalam Plantations, Ltd. v. Clark* (5).]

D *Hills* : A good test as to whether or not a man has succeeded to the business of another is to see whether or not he has taken over a business establishment as a going concern, with its staff, and all its activities. Either the business must be succeeded to or it must cease. In the present case, the trade continued. [Counsel referred to *Bell v. National Provincial Bank of England* (2).]

E *Latter, K.C.* : The meaning that it has been thought fit, on behalf of the Crown, to put on the word " succession " is erroneous, and contrary to the meaning given to the word in decided cases. Succession does not consist in the acquisition of what may be called wealth-producing assets of any sort or kind and the continuance in use of those assets in the way they were intended to be used. The true conception of the word is the acquisition and continuance of a profit-earning entity as a continuing adventure, with all its prospects and trade connections. It is impossible for the thing to work in the way the case has been put for the revenue, because there are no profits from the Burlington and Kettering businesses, which are regarded as still continuing. The goods which are made there are sold in the retail shops of the respondents. The profits which were derived from the Burlington and Kettering businesses no longer arise. They do not and cannot exist. In *Bell v. National Provincial Bank of England* (2), there was an extension of the bank's existing trade. The subsidiary companies, in the present case, had one customer only. That customer was the respondent company which took them over. No profit can be said to have been made at the factories which were taken over. There must be a realisation before there can be a profit for income tax purposes. The attempt to split up the profits afterwards realised was attempted long ago in *Erichsen v. Last* (6).

[Counsel referred to *Watson Brothers v. Lothian* (1). He was stopped by the court.]

The Attorney-General, in reply : The change from the wholesale disposal of the goods to their disposal retail, as a result of the merger in the present case, does not in law amount to carrying on a new trade. It cannot in law prevent succession. The argument put forward on A behalf of the respondent company involves that, as a matter of law, a customer cannot succeed to a supplier's trade, because inevitably the disposal of the goods after the merger would be the same.

SIR WILFRID GREENE, M.R. : Prior to Apr. 1, 1935, the respondents, B Freeman, Hardy & Willis, Ltd., were the owners of all the shares in two limited companies which manufactured boots and shoes at factories belonging to those companies. The respondents themselves are the well-known firm of boot and shoe retailers, and for the purpose of their retail C business they purchased from those two subsidiary companies the whole of the products of their factories and sold them in their shops. The subsidiary companies, being the vendors of their shoes to the respondents, thereby, by virtue of those sales, made profits. The subsidiary companies and the respondents being in law separate entities, the sales, of course, were real sales. As from Apr. 1, 1935, as the result of certain resolutions D of the two subsidiary companies and certain sale agreements, the respondents acquired the goodwill of the business of those companies, together with their freehold land, factories, plant, and so forth. Putting it shortly, they took over the whole of the assets, and they took over the staff of the two subsidiary companies, and thereafter continued to manu- E facture the same class of goods in the same factories, which had previously belonged to those two companies, and with the same machines. The products of the two factories were sold by the respondents in their shops, but of course there was this difference in the position after Apr. 1, as compared with the position before Apr. 1—namely, that, whereas in the F former period there was a sale by the two subsidiary companies to the parent company whenever the products were sold, now the shoes reached the retail purchaser without any such intermediate sale having taken place. For the purpose of their internal accountancy, the respondents G keep separate accounts for the manufacturing at these two factories, treating them for accountancy purposes as though they were separate concerns, and those accounts are kept in a way which is very common, indeed almost universal, in well-organised concerns of any size. They are kept by treating the factory as an independent entity, and crediting it, as though it were a vendor, with a notional purchase-price for the H goods it produces, that notional purchase price being arrived at by a method of adding a percentage of profit over and above the cost of production. In point of fact, that procedure, which was adopted after Apr. 1, resembles superficially what took place before Apr. 1, because, as the respondents had complete control of the two subsidiaries while

they existed, they were able to fix the purchase-price which those subsidiaries were to charge for the goods which they supplied. Similarly, after Apr. 1, 1935, they continued to fix the notional purchase-price on the same basis as that upon which it had been fixed before. I say that the resemblance is superficial, but of course the difference is essential, because, whereas in the one case the accounts reflected a true legal relationship of vendor and customer between two separate entities, they now do not reflect any such relationship, and are merely a means for the better information and guidance of the respondent company by departmentalising its own internal accounts.

- A In these circumstances, the Crown claims that Sched. D, Cases I and II, r. 11 (2), applies. That, of course, is a rule which deals with successions to trades, professions or vocations. The effect of the application of that rule, if it applied, would be that the profits of the businesses taken over from the two subsidiary companies would fall to be ascertained, upon the footing that they were new businesses set up on Apr. 1, 1935, and, by the joint operation of that rule and r. 1 (2), the measure of profits of those businesses would be the actual profits of the year, and not any profits of an earlier period. Rule 11, as it originally stood, was a rule which dealt, in a comprehensive paragraph, with cases where there was a change in the ownership of a business, whether that change was, for instance, by a change in the members of a partnership, or the dissolution of a partnership, or whether it was a change by the purchase of a business.

- C By the Finance Act, 1928, s. 32, that comprehensive rule was divided into two paragraphs, and was amended in order to bring it into line with the changes introduced in 1926 with regard to the measure on which profits were to be assessed for the purpose of Sched. D. As it stands at present, r. 11 (2) provides as follows :

- E If at any time after the said Apr. 5 [1928] any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies [that is the paragraph which deals with changes in partnerships], the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time.

- I need not read the rest. That rule is contemplating that, when Sched. D comes to be applied, it will be possible to find that the person sought to be assessed is deriving taxable profit from a trade, profession or vocation to which he has succeeded. Taking that sub-rule in connection with the first paragraph of Sched. D itself, it is contemplating that there will be a charge to tax in respect of the annual profits or gains arising or accruing to the person succeeding to the trade from the trade to which he succeeds. If, for instance, the trade which he has acquired has come to an end, it is not possible to say of him that he is deriving any profits from it. The rule appears to contemplate the continuance of a trade after a change in ownership by virtue of a succession. The language of LORD KINROSS in the Scottish case of *Watson Brothers v. Lothian* (1) may usefully be referred to in this connection. He said, at p. 444 :

That, of course, is not the case we have to deal with, which comes second in

the fourth head, and that is—if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods, the duty payable shall be estimated in a particular way; the way there again being determined by a regard to the previous history of that trade, manufacture, adventure, or concern, all upon the view that what was bought was a continuing thing, a continuing adventure, with all its prospects, with all its trade connections, and with all those things which result in the making of a profit.

That, of course, does not mean that the business, regarded after the succession, must be in every respect and in every detail identical with the business which was carried on before the succession. The successor may succeed to a business, let me say, with 50 shops. He may choose to shut up some of those shops. He may make alterations in the goods that he sells. All sorts of alterations of that kind may take place. He may change his supplier. He may cut out a particular class of customer or a particular area. All questions of that kind appear to me to be really matters of fact for the determination of the commissioners, who, where matters of that kind arise, have to set themselves the question whether or not it is true and fair to say that the business in respect of which the successor is said to be making profits is the business to which he succeeded. Changes of that kind may or may not be so substantial as to make it right to say, as a matter of fact (that would be a question for the commissioners), that the business is not the same as the one to which he succeeded. The differences may be so substantial as to justify a finding to that effect.

With those preliminary observations in mind, I come to consider their application to the facts of the present case. For the purpose of answering the question that arises, the first thing to ascertain, it seems to me, is the trade to which the respondents are said to have succeeded. When I look at the case, I find in para. 4 a sentence which appears to answer that question:

These two companies [the subsidiary companies], whose works were in Kettering and Leicester respectively, were manufacturing wholesale concerns which sold the whole of their finished products to the respondent company.

That sentence is, in my view, a finding that the business of those two companies was that of "manufacturing wholesale concerns." The circumstance that they are said to have sold the whole of their finished products to the respondent company I do not read as being part of the description of the business, but merely as a statement of fact as to the way in which the wholesale manufacturing business was in fact carried on. The important description is "manufacturing wholesale concerns," and, writing that out a little more at length, it seems to me that that quite clearly means manufacturing concerns which dispose of their products wholesale. The first question, therefore, is whether or not the business of manufacturing and disposing of their products wholesale is a business which, after Apr. 1, was carried on by the respondents. The special commissioners answered that question in the negative, and LAWRENCE, J., has affirmed their decision. In so far as the finding of the commissioners is a finding of fact, of course, we cannot interfere with

- it, but I am prepared to assume the correctness of the view which LAWRENCE, J., took—namely, that the finding does involve matters of law which we are at liberty to investigate. At any rate, the case has been argued upon that footing, although we stopped Mr. Latter, and I do not know whether he was going to elaborate an argument to the effect
- A** that the decision is a pure decision of fact. For the purpose of this judgment, nothing that I say must be taken to pre-judge that matter upon which we have not heard argument, but, assuming (and my *prima facie* inclination would be to accept the views of LAWRENCE, J., on this) that the matter is one which we can investigate, the question which arises
- B** appears to me to be whether or not it can truly be said that the business of a wholesale manufacturing concern is being carried on by the respondents. The answer to that question seems to me to be quite clearly in the negative. Manufacture in these factories is being carried on, but the mere manufacture is not the thing which produces the profit
- C** of the business. That part of the business of the subsidiaries which was essential for the realisation of taxable profit—namely, the selling of their goods wholesale—has disappeared, and the goods are now sold and the profits realised by the respondents in their ordinary organisation and in their ordinary retail shops. It seems to me, therefore, that **the**
- D** special commissioners were amply entitled to find, and I think that on the facts they were bound to find, that the businesses of the two subsidiary companies ceased, and by that I do not understand them to be finding that the manufacturing part of the businesses had ceased. Obviously, it had not. It is quite clear what that finding means. It
- E** does not mean that the factories have stopped making shoes, because they have held earlier in the case that the shoes are still being made in the factories. What it means is, I think, clearly that the businesses have ceased, in the sense that the businesses to which it is alleged the respondents succeeded under the rule now no longer exist. In other
- F** words, they ceased to exist for the purposes of the rule. The fact that manufacturing is carried on is, of course, irrelevant for the purposes of the rule in any case where the business, within the meaning of the rule, is no longer existent. That is what the commissioners have found, and, in my judgment, they were perfectly right.
- G** There is another angle from which the matter may be viewed, and it is this. The rule is a rule the object of which is to fix the method by which profits or gains are to be assessed in a particular case. The profits or gains are the profits or gains earned by means of a trade to which the taxpayer in question has succeeded. Accordingly, the question arises
- H** whether or not it is possible to put the finger upon some taxable profits arising from a trade, and to say of those profits that they arise from the trade which was taken over. In the present case, Freeman, Hardy & Willis, Ltd., realised a profit by the sale in their retail shops of boots and shoes which they manufactured in the two factories which they acquired, but that profit was not realised by the businesses which they

took over. The businesses which they took over, before they took them over, were realising a profit of a different character and on a different scale—namely, the profit of a manufacturer selling his goods wholesale. The profit that Freeman, Hardy & Willis, Ltd., now make by selling those products retail in their shops is realised by the intervention of the retail business, which was their business all along, and is their old business. It therefore seems to me impossible to predicate of the profits which they make by selling in their retail shops these boots and shoes manufactured in these factories that they are profits referable, for the purposes of the rule, to the trade to which they succeeded.

The Crown endeavours to get out of that difficulty by an argument to this effect. It says: The profit which is made by selling the boots and shoes retail in the shops can, for the present purpose, be dissected and split up into two profits, the wholesaler's profit and the retailer's profit, and, in so far as the profit is referable to the head of the wholesaler's profit, that is to be deemed for the purpose of the rule to be the profit derived from the carrying on of the trade taken over. In my judgment, that is wholly illegitimate. There is no such thing in a case of this kind, for any income tax purpose, as a wholesaler's profit. It is wholly non-existent. The expression is a convenient one from the point of view of accountants, whose task it is to dissect profits and attribute them in part to one aspect of their client's activities and in part to another aspect of their client's activities. Obviously a wholesaler makes a wholesaler's profit and a retailer makes a retailer's profit. Nevertheless, to say of a manufacturer who sells retail that he makes two profits, a wholesaler's profit and a retailer's profit—although for accountancy purposes it may be very convenient and useful that the accounts should be kept on that basis—has no reality in fact, since no profit is realised until the goods are sold, and the profit that is realised is the profit realised by disposing of the goods by sale. It is quite impossible, in my judgment, to say that the present case ought to be treated as though there had taken place a notional sale by the factory to the warehouse upon some basis to be fixed by reference to some evidence as to what a wholesaler's profit would be. I know of no such principle permissible under the Income Tax Acts, save in one case to which Mr. Latter has referred us. I need not do more than give the reference to it. It is the All Schedules Rules, r. 12, which was introduced, I think, in 1918 to meet a special case. The commissioners, in dealing with that matter, said this:

We were further of opinion that in the year 1935-36 the respondent company made one profit only, and that that profit could not for income tax purposes be divided into a manufacturing profit and a retail profit.

I entirely agree with that conclusion.

Reliance was placed, on behalf of the Crown, upon some authorities, particularly *Bell v. National Provincial Bank of England* (2). That was a case where the National Provincial Bank had acquired the business of

a banking company at Wolverhampton called the County of Stafford Bank. After that acquisition, they continued to carry on business on the premises of the County of Stafford Bank. They took over, I think, the staff and the books. Profits were there made, but those profits were merged in the entire profits of the business of the National Provincial Bank, and were not kept distinct. The Crown took the view that the National Provincial Bank had succeeded to the business of the County of Stafford Bank. The commissioners found that there was no succession, but the matter eventually came to the Court of Appeal, who held that there was a succession. That case, in my judgment, does not help the Crown. The business that was being carried on there by the acquiring company was a banking business. That business was carried on both before and after the acquisition. The business that it acquired was a banking business. That business it continued to carry on after the acquisition. The fact that the profits of the acquired business, existing, as it did, both before and after the acquisition, fell into the common pool of profits of the acquiring company did not prevent the applicability of the rule. The only difficulty that was presented was the ascertainment of the figure of those profits for the purpose of the application of the rule. The business persisted both before and after the acquisition. It was the same business. It was being carried on, and it was making profits. The problem was to find out what the profits were, and for that purpose, of course, dissections of accounts and so forth were necessary. However, that seems to me to be a totally different case from the present, where it is not possible, in my view, as I have already said, to say of the business carried on before the acquisition that it persisted after the acquisition, in view of the circumstance that that essential part of it by which the profits were realised and became taxable—namely, the wholesale selling of the products—ceased and came to an end, with the result that no profits of that description were realised at all. There were one or two other authorities referred to, but they do not really touch the present point, and I do not propose to refer to them. In my opinion, the decision of the judge affirming the decision of the commissioners was perfectly right, and the appeal must be dismissed with costs.

FINLAY, L.J. : I am entirely of the same opinion, and for the same reasons.

LUXMOORE, L.J. : I agree.

Appeal dismissed with costs. Leave to appeal refused.

Solicitors : *Solicitor of Inland Revenue* (for the inspector of taxes) ; *Kingsford, Dorman & Co.*, agents for *Harvey, Clark & Adams, Leicester* (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

KNIGHTSBRIDGE ESTATES TRUST, LTD. *v.* BYRNE.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott, L.J., and Farwell, J.), **October 25, 26, 27, 28, December 1, 1938.**]

Mortgage—Mortgage by company—Principal repayable by instalments over a period of 40 years—Postponement of redemption—Reasonableness of postponement—Clog on equity—Rule against perpetuities. A

An estate company borrowed a sum of £310,000 from an insurance company, and as security mortgaged to the lenders property consisting of 75 houses, 8 shops and a block of flats. It was a term of the mortgage that the principal should be repaid by 80 half-yearly instalments spread over a period of 40 years. The mortgagees' remedies became immediately exercisable if the mortgagors should sell the equity of redemption without the consent of the mortgagees. There was no power under which the mortgagors could sell any one of the properties mortgaged free from the mortgage. The mortgagors were restrained from granting leases for more than three years without the consent of the mortgagees. The term for repayment was suggested by the mortgagors. The mortgagors claimed that they were entitled to redeem the mortgaged property after the expiration of six months' notice upon their paying to the lenders the principal, together with interest and costs. It was contended that a provision that the mortgage should not be redeemed until the expiration of a period of 40 years was void as being a clog on the equity of redemption, and that the mortgage deed infringed the rule against perpetuities:— B C D

HELD: (i) a provision whereby a mortgage is made irredeemable for a period of 40 years is not merely by reason of the length of the period unreasonable.

(ii) the postponement of redemption for 40 years, having regard to the provisions of the mortgage deed, was not a clog upon the equity of redemption, as the provision was not unfair or unconscionable nor inconsistent with, nor repugnant to, the contractual or the equitable right to redeem. E

(iii) the rule against perpetuities is inapplicable to mortgages.

(iv) the plaintiffs were, therefore, not entitled to redeem as claimed.

Decision of LUXMOORE, J. ([1938] 2 All E.R. 444) reversed.

[EDITORIAL NOTE.] This case considers a point that has been much discussed since the practice of providing for the repayment of mortgage advances by instalments has become so common. Although it is clear that there may be cases where the number of instalments are spread over such a length of time as to make the mortgage practically irredeemable, with the result that there is a clog on the equity, the postponement of the contractual right of redemption is not in itself a clog upon the equity of redemption. There must be some further condition or circumstance that makes the postponement unfair and oppressive. Thus, if the redemption of a leasehold mortgage is postponed until the term of the lease has practically expired, the right of redemption becomes illusory. Unless, however, the postponement is oppressive, or the right of redemption is illusory, there is nothing in the postponement of the contractual right to redeem that is inconsistent with the essential requirements of a mortgage transaction. It is also held that the rule against perpetuities has no application whatsoever to mortgages. F G H

AS TO CLOG ON THE EQUITY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 306-309, paras. 460-464; and FOR CASES, see DIGEST, Vol. 35, pp. 352-354, Nos. 946-962.

AS TO MORTGAGES AND THE RULE AGAINST PERPETUITIES, see HALSBURY, Hailsham Edn., Vol. 25, pp. 160, 161, paras. 274-276.]

Cases referred to :

- ✓ (1) *Fairclough v. Swan Brewery Co., Ltd.*, [1912] A.C. 565 ; 35 Digest 353, 958 ; 81 L.J.P.C. 207 ; 106 L.T. 931.
- (2) *Talbot v. Braddil* (1683), 1 Vern. 394 ; 35 Digest 271, 277.
- (3) *Cowdry v. Day* (1859), 1 Giff. 316 ; 35 Digest 356, 990 ; 29 L.J.Ch. 39 ; 1 L.T. 88.
- A (4) *Teevan v. Smith* (1882), 20 Ch.D. 724 ; 35 Digest 301, 509 ; 51 L.J.Ch. 621 ; 47 L.T. 208.
- (5) *Biggs v. Hoddinott, Hoddinott v. Biggs*, [1898] 2 Ch. 307 ; 35 Digest 356, 993 ; 67 L.J.Ch. 540 ; 79 L.T. 201.
- (6) *Bradley v. Carritt*, [1903] A.C. 253 ; 35 Digest 354, 971 ; 72 L.J.K.B. 471 ; 88 L.T. 633 ; *reusg.*, [1901] 2 K.B. 550.
- B (7) *Williams v. Morgan*, [1906] 1 Ch. 804 ; 35 Digest 547, 2761 ; 75 L.J.Ch. 480 ; 94 L.T. 473.
- (8) *Morgan v. Jeffreys*, [1910] 1 Ch. 620 ; 35 Digest 301, 510 ; 79 L.J.Ch. 360.
- ✓ (9) *Davis v. Symons*, [1934] Ch. 442 ; Digest Supp. ; 103 L.J.Ch. 311 ; 151 L.T. 96.
- C (10) *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.*, [1914] A.C. 25 ; 35 Digest 241, 20 ; 83 L.J.Ch. 79 ; 109 L.T. 802.
- (11) *Re Hone's Estate* (1873), 8 I.R. Eq. 65 ; 35 Digest 356, case k.
- (12) *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A.C. 647 ; 35 Digest 219, 457 ; 66 L.J.Ch. 726 ; 77 L.T. 284 ; *affg. S.C. sub nom. West Derby Union Guardians v. Metropolitan Life Assurance Society, West Derby Union Guardians v. Priestman*, [1897] 1 Ch. 335.
- D (13) *Re Fortesque's Estate*, [1916] 1 I.R. 268 ; 35 Digest 356, case l.
- (14) *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300 ; 35 Digest 205, 303 ; 76 L.J.Ch. 187 ; 96 L.T. 301.
- (15) *Aylesford (Earl) v. Morris* (1873), 8 Ch. App. 484 ; 25 Digest 269, 940 ; 42 L.J.Ch. 546 ; 28 L.T. 541.
- E (16) *Re A Debtor, Ex p. The Debtor*, [1903] 1 K.B. 705 ; 35 Digest 212, 376 ; 72 L.J.K.B. 382 ; 88 L.T. 401.
- (17) *Samuel v. Newbold*, [1906] A.C. 461 ; 35 Digest 212, 377 ; 75 L.J.Ch. 705 ; 95 L.T. 209 ; *affg. S.C. sub nom. Saunders v. Newbold*, [1905] 1 Ch. 260.
- (18) *Middleton v. Brown* (1878), 47 L.J.Ch. 411 ; 25 Digest 266, 904 ; 38 L.T. 334.
- ✓ (19) *Noakes & Co., Ltd. v. Rice*, [1902] A.C. 24 ; 35 Digest 241, 19 ; 71 L.J.Ch. 139 ; 86 L.T. 62 ; *affg.*, [1900] 2 Ch. 445.
- F (20) *Norfolk (Duke) v. Howard* (1683), 1 Vern. 163 ; 37 Digest 76, 175 ; *reusd. on other grounds* (1685), 1 Vern. 164.
- (21) *Re Frost, Frost v. Frost* (1889), 43 Ch.D. 246 ; 37 Digest 72, 130 ; 59 L.J.Ch. 118 ; 62 L.T. 25.
- (22) *Re Hollis' Hospital Trustees & Hague's Contract*, [1899] 2 Ch. 540 ; 37 Digest 72, 133 ; 68 L.J.Ch. 673 ; 81 L.T. 90.
- G (23) *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535 ; 37 Digest 98, 336 ; *sub nom. Re Ashforth's Trusts, Ashforth v. Sibley*, 74 L.J.Ch. 361 ; 92 L.T. 534.
- (24) *Re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337 ; 37 Digest 73, 134 ; 81 L.J.Ch. 293 ; 106 L.T. 458.
- (25) *Re Tyrrell's Estate*, [1907] 1 I.R. 292 ; 37 Digest 117, case 481 iv.
- (26) *Worthing Corpn. v. Heather*, [1906] 2 Ch. 532 ; 37 Digest 81, 212 ; 75 L.J.Ch. 761 ; 95 L.T. 718.
- H (27) *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (1900), Ltd.*, [1910] 1 Ch. 12 ; 37 Digest 80, 200 ; 79 L.J.Ch. 150 ; 101 L.T. 865.

APPEAL by the defendants from a judgment of LUXMOORE, J., dated Apr. 13, and reported [1938] 2 All E.R. 444, where the facts are fully set out.

The respondents are a limited company engaged in carrying on a business of owning and managing a large estate consisting of shops, residences and a block of flats. The appellants are the trustees of an insurance company. The respondents borrowed £310,000 from the insurance company and as security mortgaged to the lenders property consisting of 73 houses, 8 shops and a block of flats. The respondents A covenanted to repay the mortgage debt by 80 equal half-yearly instalments to cover both principal and interest, and there was a proviso for redemption in the mortgage deed in accordance therewith. The respondents claimed that they were entitled to redeem at any time on the ground that the bargain was invalid in that it offended against the B equitable principle of redemption and also infringed the rule against perpetuities. It was provided by the mortgage deed that, if default was made by the borrower in respect of any one instalment, the whole of the principal and interest should become at once repayable to the mortgagees. C

J. M. Gover, K.C., Sir William Jowitt, K.C., and Wilfrid M. Hunt for the appellants.

F. R. Evershed, K.C., and J. H. Stamp for the respondents.

Gover, K.C. : As the respondents are a limited company, the mortgage D falls within the description of a debenture, and is therefore not impeachable in any way on the ground of irredeemability. If, in a mortgage deed, the mortgagor covenants to repay on a specified date, the mortgagee cannot take any remedy for the recovery of the debt until that date has arrived. The whole of this question of postponement of remedy has arisen from the *dictum* of SIR GEORGE JESSEL, M.R., in *Teevan v. Smith* (4). There is nothing about the point in any of the recognised E textbooks on mortgages. There are cases which have confused the principle prohibiting unconscionable bargains with the principle requiring redemption within a reasonable period. There is no authority F for saying that the contractual period must be within a reasonable period. Previous to this *dictum* of SIR GEORGE JESSEL, M.R., in 1882, there are only three cases which have any bearing upon the matter : *Talbot v. Braddil* (2), *Cowdry v. Day* (3) and *Re Hone's Estate* (11). There is no ground for saying that a period of 5 to 7 years only is valid. G A mortgagor may stipulate for a collateral advantage, provided the equity of redemption is not thereby affected : *Biggs v. Hoddinott* (5). The statutory powers of the mortgagor are subject to any contrary powers expressed in the mortgage deed. [Counsel referred to *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* (10), *Williams v. Morgan* (7), *West Derby Union v. Metropolitan Life Assurance Society* (12), *Bradley v. Carritt* (6), *Morgan v. Jeffreys* (8), *Fairclough v. Swan Brewery Co., Ltd.* (1), *Re Fortesque's Estate* (13), *Davis v. Symons* (9) and *Lodge v. National Union Investment Co., Ltd.* (14).] H

Jowitt, K.C. : At the back of the cases, there seem to be some indefinite

- and undigested doctrines which seem to suggest that there is some right to do that which there is no right to do—namely, re-model contracts. In cases arising out of the Moneylenders Acts, it became necessary to find what were the principles upon which equity would give relief where it was said that the bargain was harsh and unconscionable. It was
- A** when the two parties were not on equal bargaining terms. Where the parties bargained on equal terms, and each of them was able to think out his own contract, equity would not give relief. Sometimes the position of the parties was such that the *onus probandi* was shifted, and a person was required to show that the contract should stand : *Aylesford*
- B** (*Earl*) *v. Morris* (15). In *Re A Debtor, Ex p. The Debtor* (16), SIR RICHARD HENN COLLINS, M.R., summarised the position in which a court of equity would give relief. [Counsel referred to *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* (10), *Samuel v. Newbold* (17) and *Middleton v. Brown* (18).]
- C** *Evershed, K.C.* : In a mortgage, there must be a right to redeem, and that right must be a reasonable one. It follows that, if the court considers that the right to redeem is not a reasonable one, the effect of it is to avoid the contract. A reasonable right to redeem is not given to the mortgagor in the present case. The whole property, in the present case,
- D** is completely sterilised for the whole period of 40 years. The bargain is so bad that the equity of redemption is elusive. There is a real hardship, which increases as time goes on. At the time the bargain was entered into, the parties never contemplated that it would be carried out according to the terms of the document. There is something which
- E** defeats the mortgagor's right to redeem where there is a covenant to repay without any correlative right to get back any part of the security. *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* (10), is a case upon which I rely to refute the argument put forward as to the principle on which equity acts. It is going too far to say that, unless a bargain
- F** is unconscionable, equity does not act at all. A penalty does not necessarily involve anything unconscionable. In covenants in restraint of trade, the matter rests upon public policy, and not upon the matter of being unconscionable. In the present case, there is an absence of mutuality. Parties may agree to a contract in which there is an absence
- G** of mutuality if they so choose, but the absence of mutuality in a mortgage may be evidence as to there being a reasonable right to redeem. The statement in GRAY ON THE RULE AGAINST PERPETUITIES, p. 174, is well-founded. There is nothing in logic or in sense to exclude a mortgage from the rule, particularly where there is a term of years which
- H** becomes determinable upon the happening of a future event. One has to look at the transaction separately from the point of view of the law and the point of view in equity. [Counsel referred to *Noakes & Co., Ltd. v. Rice* (19), *Morgan v. Jeffreys* (8), *Re Fortesque's Estate* (13), *Davis v. Symons* (9), *Norfolk (Duke) v. Howard* (20), *Re Frost, Frost v. Frost* (21), *Re Hollis' Hospital Trustees & Hague's Contract* (22), *Re Ashforth, Sibley*

v. *Ashforth* (23), *Re Da Costa*, *Clarke v. Church of England Collegiate School of St. Peter* (24) and *Re Tyrrell's Estate* (25).]

Stamp: The law requires the presence of certain elements in a mortgage. It is not a question as to whether anything is conscionable or unconscionable. The law requires that there shall be a right of redemption, and that, when a mortgagor exercises that right, he shall get back his property free from every kind of disadvantage, clog or incumbrance. When the mortgage is looked at as a whole, it will be seen that the mortgagor is in a position of great hardship as compared with the mortgagees. [Counsel referred to *Fairclough v. Swan Brewery Co., Ltd.* (1), *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* (10), *Noakes & Co., Ltd. v. Rice* (19), *Bradley v. Carritt* (6) and *Biggs v. Hoddinott* (5).]

Gover, K.C.: The rule against perpetuities does not apply, and never has been regarded as applying, to mortgages. Mortgages are not within the mischief which the rule against perpetuities is intended to prevent: HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 25, p. 78. [Counsel referred to *Worthing Corpn. v. Heather* (26), and *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (1900), Ltd.* (27).]

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]: The respondents are the owners of a large freehold estate situate in a high-class residential and shopping district close to Knightsbridge and comprising a number of houses, shops and flats. On May 6, 1927, by an instrument of charge and mortgage of that date, they charged the estate with repayment to the Prudential Assurance Co., Ltd., on Nov. 6, 1927, of a sum of £300,000, advanced to them by that company with interest at 6½ per cent. per annum, reducible to 6 per cent. on punctual payment. By the same instrument, the respondents assigned to the assurance company by way of further security a sinking fund policy for £300,000 the premiums on which they covenanted to pay. There was also a guarantee of the interest and premiums by a limited company and an individual, and a provision under which the respondents, by giving 6 months' notice, could reduce the loan by any multiple of £1,000 not less than £10,000 at any one time.

In Jan., 1931, the respondents were desirous of paying off this mortgage and obtaining a loan for the purpose on more favourable terms. Accordingly, their managing agents, the well-known firm of George Trollope & Sons, approached the Royal Liver Friendly Society by a letter dated Jan. 28, 1931. The terms for which they asked were (i) that the rate of interest should not exceed 5¼ per cent. per annum, (ii) that the mortgage would not fall due in less than 35 years, (iii) that there should be no obligation to maintain a sinking fund, and (iv) that the mortgage should be repayable, in the event of a sale of the properties at 6 months' notice, at 102½ per cent. if repaid before Jan. 1, 1950, and thereafter at 6 months' notice at par. This proposal was not acceptable to the society, and on Apr. 21, 1931, George Trollope & Sons asked

what the society's terms would be for a loan of £310,000 at 5½ per cent., repayable over a period of 40 years. The society agreed to grant a loan upon these terms, repayment to be made by half-yearly instalments, and ultimately, on Nov. 6, 1931, a mortgage embodying this agreement was executed in favour of the appellants, who are the trustees of the society. Clause 1 of the mortgage contains a covenant by the respondents to pay the principal sum of £310,000, with interest at 5½ per cent. per annum, by 80 half-yearly instalments of principal and interest combined of £9,308 14s. 3d. (less tax on interest), with a provision that the whole of the mortgage money outstanding shall become immediately payable on any default in payment. By cl. 2, the property was demised to the appellants for a term of 3,000 years, with a proviso for redemption on payment of the principal money and interest "by the instalments at the respective times and in manner specified in the covenant" by the respondents contained in cl. 1, and mortgagees' costs. Clause 3 contained a number of usual covenants by the respondents, including covenants to repair and insure all buildings. The borrowers' statutory power of leasing was not to be exercised without the consent of the mortgagees, which was not to be unreasonably or arbitrarily withheld. The statutory powers of the mortgagees were to be exercisable on any breach by the borrowers of their covenants, and also on any sale of the equity of redemption in any part of the premises without the consent of the mortgagees, which was not to be unreasonably withheld in the case of a respectable and responsible person. There were other provisions which it is not necessary to set forth, and there was also a covenant by the mortgagees to accept payment by the instalments mentioned.

On Feb. 25, 1937, the respondents issued the writ in this action, claiming to be entitled to redeem the mortgaged property on the usual notice on payment of the principal amount remaining due, with interest and mortgagees' costs, notwithstanding the provision in the mortgage deed whereby the mortgage moneys were made repayable only by instalments spread over the period of 40 years. The ground upon which this claim was based was set out in the statement of claim, and was to the effect that the provision in question :

... if and so far as it prevents the plaintiffs from redeeming the said mortgage at any time upon proper payment of principal and interest is illegal and void as a clog on their right to redeem the said mortgage and that it renders the same irredeemable for an undue length of time and is not capable of being enforced against them.

At the trial before LUXMOORE, J., the only arguments presented on behalf of the respondents were to the effect that the provision for postponing the contractual right to redeem until the instalments had been paid was (i) void in itself, as postponing the contractual right for too long a time, or alternatively (ii) void by reason of certain other features of the mortgage deed. On behalf of the appellants, it was argued, among other things, that the mortgage deed was a "debenture" within

the meaning of the Companies Act, 1929, ss. 74, 380. This argument was rejected by the judge. Having regard to the view which we took of the other points raised in the case, it was unnecessary for us to require argument upon it, and accordingly we express no opinion as to the correctness of the decision of LUXMOORE, J., in this respect. LUXMOORE, J., reserved his judgment, and, in the course of considering it, it occurred to him that there might be a question whether the provision for redemption at the expiration of 40 years might not offend against the perpetuity rule. As this point had not been taken at the trial, he ordered the action to be restored to the list, and heard argument upon it. He then reserved his judgment, which he delivered on Apr. 13, 1938. He was of opinion that the provision in question did not offend against the perpetuity rule, but he decided in favour of the respondents upon the second of the two arguments above referred to—namely, that the postponement of the contractual right to redeem until the repayment by instalments had been effected was void by reason of certain other features of the deed—and he made the declaration which the respondents were seeking. A B C

We will deal first with the arguments originally presented on behalf of the respondents. The first argument was that the postponement of the contractual right to redeem for 40 years was void in itself. In other words, the making of such an agreement between mortgagor and mortgagee was prohibited by a rule of equity. It was not contended that a provision in a mortgage deed making the mortgage irredeemable for a period of years is necessarily void. The argument was that such a period must be a "reasonable" one, and it was said that the period in the present case was an unreasonable one, by reason merely of its length. This argument was not the one accepted by the judge. D E

An argument such as this requires the closest scrutiny, for, if it is correct, it means that an agreement made between two competent parties, acting under expert advice and presumably knowing their own business best, is one which the law forbids them to make upon the ground that it is not "reasonable." If we were satisfied that the rule of equity was what it is said to be, we should be bound to give effect to it. However, in the absence of compelling authority, we are not prepared to say that such an agreement cannot lawfully be made. A decision to that effect would, in our view, involve an unjustified interference with the freedom of business men to enter into agreements best suited to their interests, and would impose upon them a test of "reasonableness" laid down by the courts without reference to the business realities of the case. It is important to remember what those realities were. The appellants are a private company, and do not enjoy the facilities for raising money by a public issue possessed by public companies. They were the owners of a large and valuable block of property, and, so far as we know, they had no other assets. The property was subject to a mortgage at a high rate of interest, and this mortgage was liable to be F G H

called in at any time. In these circumstances, the respondents were, when the negotiations began, desirous of obtaining for themselves two advantages, (i) a reduction in the rate of interest, and (ii) the right to repay the mortgage moneys by instalments spread over a long period of years. The desirability of obtaining these terms from a business point of view is manifest, and it is not to be assumed that these respondents were actuated by anything but pure considerations of business in seeking to obtain them. The sum involved was a very large one, and the length of the period over which the instalments were spread is to be considered with reference to this fact. In the circumstances, it was the most natural thing in the world that the respondents should address themselves to a body desirous of obtaining a long-term investment for its money. The resulting agreement was a commercial agreement between two important corporations experienced in such matters, and has none of the features of an oppressive bargain where the borrower is at the mercy of an unscrupulous lender. In transactions of this kind, it is notorious that there is competition among the large insurance companies and other bodies having large funds to invest, and we are not prepared to view the agreement made as anything but a proper business transaction. It is said, however, not only that the period of postponement must be a reasonable one, but also that, in judging the "reasonableness" of the period, the considerations which we have mentioned cannot be regarded, and that the court is bound to judge "reasonableness" by a consideration of the terms of the mortgage deed itself, without regard to extraneous matters. In the absence of clear authority, we emphatically decline to consider a question of "reasonableness" from a standpoint so unreal. To hold that the law is to tell business men what is reasonable in such circumstances, and to refuse to take into account the business considerations involved, would bring the law into disrepute. Fortunately, we do not find ourselves forced to come to any such conclusion.

Mr. Stamp, when pressed as to the matters which, upon the respondents' argument, the court might legitimately consider upon the question of reasonableness, made a curious concession. He said that the court might hold a longer period to be reasonable where the borrower was a body like the Corporation of the City of London, with a long expectation of life, than where the borrower was a private individual, or a limited company, which, for this purpose (at any rate, in the case of private companies), he treated as a mere body of individuals. This was because he said that the period of reasonableness must be judged by reference to the normal duration of human life—what age the borrower was to be assumed to be and whether a longer period would be permissible for a borrower aged 30 than for a borrower aged 65 he preferred not to say. This was the extent of Mr. Stamp's concession. The fact that it was made illustrates very pointedly what appears to us to be the inadmissibility of a principle by which the test of "reasonableness" is to be so

artificially circumscribed. Assuming, therefore, without in any way deciding, that the period during which the contractual right of redemption is postponed must be a "reasonable" one (a question which we will now proceed to examine), we are of opinion that the respondents have failed to establish (and the burden is on them) that there is anything unreasonable in the mere extension of the period for 40 years, in the circumstances of the present case. A

In our opinion, however, the proposition that a postponement of the contractual right of redemption is only permissible for a "reasonable" time is not well-founded. Such a postponement is not properly described as a clog on the equity of redemption, since it is concerned with the contractual right to redeem. It is indisputable that any provision which hampers redemption after the contractual date for redemption has passed will not be permitted. Further, it is undoubtedly true to say that a right of redemption is a necessary element in a mortgage transaction, and, consequently, that, where the contractual right of redemption is illusory, equity will grant relief by allowing redemption. This was the point in *Fairclough v. Swan Brewery Co., Ltd.* (1), decided in the Privy Council, where, in a mortgage of a lease of 20 years, the contractual right to redeem was postponed until 6 weeks before the expiration of the lease. The reason for that decision is explained in the judgment, at p. 570 : D

The learned counsel on behalf of the respondents admitted, as he was bound to admit, that a mortgage cannot be made irredeemable. That is plainly forbidden. Is there any difference between forbidding redemption and permitting it, if the permission be a mere pretence ? Here the provision for redemption is nugatory. E

Moreover, equity may give relief against contractual terms in a mortgage transaction if they are oppressive or unconscionable, and, in deciding whether or not a particular transaction falls within this category, the length of time for which the contractual right to redeem is postponed may well be an important consideration. In the present case, no question of this kind was, or could have been, raised. F

Equity, however, does not reform mortgage transactions because they are unreasonable. It is concerned to see two things, (i) that the essential requirements of a mortgage transaction are observed, and (ii) that oppressive or unconscionable terms are not enforced. Subject to this, it does not, in our opinion, interfere. The question therefore arises whether, in a case where the right of redemption is real, and not illusory, and there is nothing oppressive or unconscionable in the transaction, there is something in a postponement of the contractual right to redeem, such as we have in the present case, that is inconsistent with the essential requirements of a mortgage transaction. Apart from authority, the answer to this question, in our opinion, would clearly be in the negative. Any other answer would place an unfortunate restriction on the liberty of contract of competent parties who are at arm's length. In the present case, it would have operated to prevent the respondents obtaining H

financial terms which, for obvious reasons, they themselves considered to be most desirable. It would, moreover, lead to highly inequitable results. The remedy sought by the respondents, and the only remedy which is said to be open to them, is the establishment of a right to redeem at any time, on the ground that the postponement of the contractual right to redeem is void. They do not, and could not, suggest that the contract as a contract is affected, and the result would accordingly be that, whereas the respondents would have had from the first the right to redeem at any time, the appellants would have had no right to require payment otherwise than by the specified instalments.

Such an outcome to a bargain entered into by business people negotiating at arm's length would indeed be unfortunate, and we should require clear authority before coming to such a conclusion.

- We will now turn to the relevant authorities cited in argument by counsel for the parties. The first in order of date is *Talbot v. Braddil* (2).
- That was a case where the plaintiff mortgaged certain property by demise at a nominal rent to secure a loan of £320, with a contractual right to redeem on payment of £380 at the expiration of 31 years after the date of the mortgage. The property consisted of lands in possession worth £15 per annum, a reversionary interest in land worth £17 per annum, subject to the life interest of the mortgagor's mother, and other lands worth £8 per annum after a term of 26 years. The whole income as it came into possession would have been receivable by the mortgagee. The mother died within 3 years. SIR FRANCIS NORTH thought it an "unreasonable bargain," and allowed redemption on payment of the difference between the rents received (less the cost of lasting improvements) and the principal sum of £320, with interest. This case appears to have been one in which the transaction was really unconscionable, since the mortgagor was a reversioner. The decision, in our opinion, is not based merely on the length of time for which redemption was postponed, and is no authority for the proposition that such a postponement is in itself not permissible.

The next case is *Cowdry v. Day* (3). There the mortgagee was a solicitor and the mortgagor was his client. Such transactions are subject to special rules of their own, and the case is of no assistance in answering the present question.

The respondents' sheet-anchor was a *dictum* of SIR GEORGE JESSEL, M.R., in *Teevan v. Smith* (4), at p. 729 :

... although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as 5 or 7 years.

We cannot treat this *dictum* as representing a considered opinion to the effect that the contractual right of redemption may only be postponed for a period of the order mentioned where the right of redemption is a real, and not an illusory, one. SIR GEORGE JESSEL, M.R., was merely giving an example to illustrate a point in his reasoning, and he naturally

chose one with regard to which no possible controversy could arise. He was not, in our opinion, asserting any such doctrine as that for which the respondents contend. This *dictum* was referred to by ROMER, J., in *Biggs v. Hoddinott* (5), at p. 311. In that case, a mortgage to brewers was for 5 years certain, with a "tie" during the continuance of the mortgage. Two questions arose in the case, one as to the right of the mortgagee to redeem before the expiration of the 5 years, the other as to the validity of the tie. ROMER, J., held that there was no objection to the 5 year period, either in itself or when taken in conjunction with the tie. He said, at p. 311 :

... I am of opinion that it is obviously to the advantage of both the mortgagor and mortgagee that such a provision should be enforced. Of course, that does not prevent the court in a proper case from preventing the application of the clause if it is too large or there are circumstances connected with the proviso which renders it, in the opinion of the court, unreasonable or oppressive.

Here again we cannot read these observations as meaning that, in a case where there is no circumstance of oppression, a real contractual right of redemption is to be displaced merely because it is postponed for a substantial period. We do not think that the word "unreasonable" should be interpreted as meaning that the court is to disregard the bargain made by the parties merely because it comes to the conclusion that it is an unreasonable one. A postponement of the right of redemption may be the badge of oppression, or it may be unreasonable in the sense that it renders the right of redemption illusory. We doubt whether ROMER, J., meant more than this.

Bradley v. Carritt (6) was a true case of a clog on the equity of redemption. LORD MACNAGHTEN, in reference to *Biggs v. Hoddinott* (5), said, at pp. 259, 260 :

In the first place, it purported to decide that a mortgage may be made irredeemable for a reasonable period. Well, everybody knows that when money was placed out on mortgage as an investment nothing was more common than to make the mortgage irredeemable for a certain limited time. It was an old and well-established practice, and a very reasonable practice too.

We do not think that this passage really assists the respondents. On the contrary, the reference to placing out money on mortgage as an investment appears to us to support the view that, where the period of the mortgage is fixed upon an investment basis, and is not a cloak for something else, there is no ground for interference.

In *Williams v. Morgan* (7), the period of the mortgage was 14 years, but it does not appear to have been suggested that there was any objection to it.

Morgan v. Jeffreys (8) was a case in which, as appears from a copy of the mortgage with which we were furnished, the covenant was to repay the mortgage money on a date 6 months after the date of the mortgage, with a proviso for reconveyance on such payment. This circumstance is not stated in the report, but for present purposes it is very important. The mortgage then contained a provision by which the mortgagor was

precluded from paying off the debt for a period of 28 years unless the mortgagee was willing to receive it earlier. The mortgage also contained a "tie"—it was a public-house mortgage, and the mortgagee was a brewer—and this tie was to last for 31 years. The mortgagor (who was a working miner) claimed to be entitled to redeem before the

A 28 years had elapsed, and JOYCE, J., held that he was entitled to do so. He relied on the length of the period, the absence of mutuality, the position of the mortgagor, the character of the stipulation in the agreement and the severity of the provisions for the benefit of the mortgagee, and held that, in all the circumstances, the period of 28 years "exceeded

B all reasonable limit." In fact, the provision precluding the right of the mortgagor to redeem for 28 years unless the mortgagee agreed was a device intended to make the contractual right to redeem in 6 months inoperative, the object clearly being to enable the mortgagee to enjoy the benefit of the tie during that period. This case does not, in our

C opinion, assist the respondents.

The last case is *Davis v. Symons* (9), decided by EVE, J. As appears from copies of the documents supplied to us, the covenant in that case was to pay the principal moneys on Feb. 25 then next, with a corresponding proviso for redemption with regard to an endowment life policy

D which was included in the mortgage. There was no express proviso for redemption in the case of the land which formed part of the security, since no such proviso was required in view of the Law of Property Act, 1925, s. 115. The deed contained a covenant by the mortgagee to allow the mortgage to remain on foot for 20 years—namely, until Nov. 25,

E 1946—or until the earlier death of the mortgagor, and a covenant by the mortgagor that the whole of the principal money should remain on the security for the like period. In this respect the case resembled that of *Morgan v. Jeffreys* (8). The policy was due to mature 8 days before the expiration of the 20 years. There was a further charge upon the

F same terms, which included also another policy which matured in 1942, and it was provided that, if the mortgagor survived that date, the policy moneys were to be paid to the mortgagee. The mortgage contained a covenant by the mortgagor not to sell the equity of redemption except to a responsible person. The mortgagor was held entitled to redeem

G before the expiration of the 20 years. EVE, J., pointed to the distinction between cases where there was, and those where there was not, mutuality in the matter of the postponement of redemption, and expressed the view that, in cases of mutuality, even if the postponement was a long one, there was no reason why the court should allow the mortgagor to

H escape from his contract. The test which he applied for the purpose of this observation was whether or not the postponement was "extravagant and oppressive," a test with which we do not quarrel. He also, however, introduced the word "reasonable," and, if that means something less than oppressive, we cannot agree with its use in this connection, for reasons which already sufficiently appear. He then went on to point

out that the policies were in substance irredeemable, a circumstance of doubtful materiality in view of the observations of LORD PARKER in *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* (10), at p. 53. He also placed some reliance on the covenant by the mortgagor with regard to a sale of the equity of redemption, which he thought must "hamper the mortgagor to an unreasonable extent." With regard to this suggested test of reasonableness, it is worth pointing out that, even in the case of collateral advantages extending beyond redemption which do not amount to a clog on the equity of redemption, there is no rule of equity which prohibits them if they are not either (i) unfair and unconscionable, (ii) in the nature of a penalty clogging the equity of redemption, or (iii) inconsistent with, and repugnant to, the contractual and equitable right to redeem: *per* LORD PARKER in *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* (10), at p. 61. In our judgment, the decision in *Davis v. Symons* (9) can be supported on the ground that the provision for postponement of redemption was a device to fetter the right to redeem on performance of the covenant for payment on the Feb. 25 following the date of the mortgage. In so far as it is based upon the view that the court is concerned with questions of reasonableness in such a case, we respectfully dissent from it.

In this case, LUXMOORE, J., does not express the opinion that the postponement is to be regarded as void by reason merely of its length. He holds that the period is, "having regard to all the provisions of the deed, unreasonable." The provisions to which he refers are set out in his judgment, and we need not repeat them. We find ourselves unable to take the view that the court is entitled, in such a case as the present, to treat as unreasonable provisions in a mortgage deed entered into by two parties such as we have here, with the assistance of competent advisers. For all the court can know, provisions which may appear to it to be disadvantageous to the mortgagor may have been regarded by him, and correctly regarded, as of no practical consequence from a business point of view.

In the present case, during the negotiations for the loan, the respondents asked for a term to be inserted enabling them to obtain the release from the security of such parts of the property as they might sell or let on long leases. They did not, however, insist on this, and were willing to accept an assurance from the mortgagees upon the subject. We do not see how they can now turn round and say that the omission of such a term was unreasonable. In our opinion, if we are right in thinking that the postponement is by itself unobjectionable, it cannot be made objectionable by the presence in the mortgage deed of other provisions, unless the totality is sufficient to enable the court to say that the contract is so oppressive or unconscionable that it ought not to be enforced in a court of equity. If such other provisions are collateral advantages which are inadmissible upon the principles laid down by LORD PARKER in the passage cited above, they will, of course, fall to be dealt with as such.

The second ground upon which the respondents endeavoured to support the judgment of the court below was that the postponement of the contractual right to redeem for a period of 40 years offended the rule against perpetuities, and was, therefore, invalid. The judge decided against the respondents on this question, and, in our judgment, rightly.

- A The rule against perpetuities is a rule which was made to prevent the mischief arising from the attempts of settlors, testators and others to postpone the alienation of property for unduly long periods. It is not of universal application, although the cases in which the rule does apply are now well-settled. The rule has never been applied to mortgages—
 B no doubt because such transactions do not produce the mischief which the rule was intended to prevent—and in this connection it is noteworthy that the legislature has expressly recognised the validity of long-term mortgages in the power to borrow given to local authorities by various Acts of Parliament: see, for example, the Local Government Act, 1923, s. 198. In these circumstances, it would not be right now for the first time to hold that the rule was applicable to mortgages, and it is therefore unnecessary for us to express any opinion upon the question whether, if the rule applied, the provisions of this mortgage would offend it. The appeal is allowed, with costs here and below.

- D *Appeal allowed, with costs in both courts. Action to be dismissed, such order not to operate as an order for foreclosure. Leave to appeal.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Bremner, Sons & Corlett*, Liverpool (for the appellants); *Clifford-Turner & Co.* (for the respondents).

- E [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

READ v. CROYDON CORPORATION.

- F [KING'S BENCH DIVISION (Stable, J.), November 10, 11, 14, 15, 16, 17, 18, 21, December 2, 1938.]

Water Supply—Purity of supply—Water infected by typhoid bacillus—Infant plaintiff contracting typhoid—Negligence—Breach of contract—Sale of goods—Breach of warranty—Breach of statutory duty—Nuisance—Sale of Goods Act, 1893 (c. 71), s. 14—Waterworks Clauses Act, 1847 (c. 17), s. 35—Public Health Act, 1936 (c. 49), ss. 111, 115.

- G The defendant corporation owned and maintained two water wells, the Addington and Stroud Green wells, for the purpose of supplying water to residents of the borough. The adult plaintiff was a ratepayer in the said borough, and the infant plaintiff, his daughter, resided with him in the house in respect of which he paid the water rate. It was admitted that, as a result of drinking water supplied from the Addington well, the infant plaintiff contracted typhoid. The infant plaintiff claimed damages in respect of her illness, and the adult plaintiff claimed certain special damage incurred in consequence of that illness. It was found upon the facts that the defendants had not been negligent in the selection of the gathering ground, nor in the selection and supervision of its workmen, but that they had been negligent in that, during the carrying out of certain work at the
- H

Addington well, precautions in the form of continual analysis of the water, searching inquiry into the antecedents of the workmen, and incessant supervision over them, were not taken. The plaintiffs contended, *inter alia*, (i) that the failure, on the part of the defendant corporation, to supply pure and wholesome water, amounted to common law negligence, (ii) that there was a contract for the sale of goods—namely, water—and that there was a breach of the implied warranty contained in the Sale of Goods Act, 1893, s. 14, (iii) that, apart from the Sale of Goods Act, 1893, s. 14, there was a breach of contract for the rendering of services—namely, the supply of water—which included an implied warranty similar to that contained in the Sale of Goods Act, 1893, s. 14, and (iv) that the defendants were guilty of breaches of their statutory duty under the Waterworks Clauses Act, 1847, s. 35, and under the Public Health Act, 1936, ss. 111, 115. The defendants contended, *inter alia*, (i) that they were not guilty of common law negligence, (ii) that there was no contract for the sale of goods or otherwise, and (iii) that they were under no duty to the plaintiffs either under the Waterworks Clauses Act, 1847, or under the Public Health Act, 1936, and, alternatively, that, if they were under any such duty or duties, the breach thereof conferred no right of action upon the plaintiffs:—

HELD: (i) the defendants were guilty of negligence at common law.

(ii) where one person is by statute bound to supply water and another is entitled to receive it, there is no contractual relationship between these two persons, although the rights and obligations arising out of a statutory provision may be similar to, or identical with, those arising out of an ordinary contract.

(iii) the defendants were guilty of a breach of statutory duty under the Waterworks Clauses Act, 1847, s. 35, but that breach conferred a right of action upon a ratepayer only, and not upon persons resident in his household. This remedy was, therefore, confined to the adult plaintiff.

(iv) although the Waterworks Clauses Act, 1847, provides a penalty for a breach of a statutory duty, upon the proper construction of that Act, this is not an exclusive remedy, and an action for damages can also be brought in respect of a breach of that duty.

[EDITORIAL NOTE.] The common law principles affecting water supply were recently before the Court of Appeal in *Barnes v. Irwell Valley Water Board*, [1938] 2 All E.R. 650; Digest Supp., and the decision here applies those principles in much the same way as the Court of Appeal there applied them. The judgment herein, however, goes on to consider the nature and extent of the statutory duties arising under the Waterworks Clauses Act, 1847, and the Public Health Act, 1936, and the extent of the remedies provided by the former, *i.e.*, whether they are confined to the recovery of penalties or enable an injured person to bring an action for damages. In addition to these considerations, it is decided that the relationship between a local authority supplying water and the ratepayer supplied is not that arising between parties to a contract for the sale of goods or for services. There is no contractual relationship between such parties, and the remedies, therefore, must be based on breach of statutory duty or upon negligence at common law. The examination of the position under these various Acts will undoubtedly be of the greatest assistance to those concerned with the supply of water for domestic purposes, and, in a lesser degree, to those taking a supply.

AS TO PURITY OF WATER SUPPLY, see HALSBURY, 1st Edn., Water Supply, Vol. 28, pp. 299, 300, para. 552; and FOR CASES, see DIGEST, Vol. 43, p. 1078, Nos. 132-138.]

Cases referred to:

(1) *Ferrens v. O'Brien* (1883), 11 Q.B.D. 21; 15 Digest 911, 10,026; 52 L.J.M.C.

- (2) *Milnes v. Huddersfield Corpn.* (1886), 11 App. Cas. 511; 43 Digest 1078, 136; 56 L.J.Q.B. 1; 55 L.T. 617; *on appeal from* (1883), 12 Q.B.D. 443.
- (3) *Clegg, Parkinson & Co. v. Earby Gas Co.*, [1896] 1 Q.B. 592; 38 Digest 55, 317; 65 L.J.Q.B. 339.
- (4) *Re Richmond Gas Co. & Richmond (Surrey) Corpn.*, [1893] 1 Q.B. 56; 25 Digest 478, 48; 62 L.J.Q.B. 172; 67 L.T. 554.
- A (5) *Scammell (G.) & Nephew, Ltd. v. Hurley*, [1929] 1 K.B. 419; Digest Supp.; 98 L.J.K.B. 98; 140 L.T. 236.
- (6) *Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 38 Digest 102, 733; 74 L.J.K.B. 484; 92 L.T. 568.
- (7) *Roths (Countess) v. Kirkcaldy Waterworks Comrs.* (1882), 7 App. Cas. 694; 43 Digest 1075, 119.
- B (8) *Hammond v. St. Pancras Vestry* (1874), L.R. 9 C.P. 316; 38 Digest 25, 135; 43 L.J.C.P. 157; 30 L.T. 296.
- (9) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 42 Digest 870, 197; 93 L.J.K.B. 5; 129 L.T. 777.
- (10) *Atkinson v. Newcastle & Gateshead Waterworks Co.* (1877), 2 Ex. D. 441; 38 Digest 56, 330; 46 L.J.Ex. 775; 36 L.T. 761; *revsg.* (1871), L.R. 6 Exch. 404.
- C (11) *Glossop v. Heston & Isleworth Local Board* (1879), 12 Ch.D. 102; 38 Digest 42, 249; 49 L.J.Ch. 89; 40 L.T. 736.
- (12) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (13) *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.*, [1915] A.C. 654; 42 Digest 719, 1391; 84 L.J.K.B. 907; 112 L.T. 826; *revsg.*, [1914] 3 K.B. 1.
- D (14) *Simpson v. South Oxfordshire Water & Gas Co.*, [1908] 1 K.B. 917; 43 Digest 1078, 135; 77 L.J.K.B. 461; 98 L.T. 585.

ACTION for damages for negligence and/or breach of warranty and/or breach of contract and/or breach of statutory duty and/or nuisance. The material allegations in the pleadings were as follow. The statement of claim alleged that at all material times the adult plaintiff, in consideration of the payment of water rate, received from the defendants at his dwelling-place a supply of water for domestic purposes. The supply so taken by the plaintiff was derived from a reservoir known as the Addington reservoir, which is fed by two wells known as the Addington and Stroud Green wells. In taking that supply for domestic purposes, the adult plaintiff by implication made known to the defendants that he required the same for the purpose, *inter alia*, of its being used as drinking water by members of his household, so as to show, as the fact was, that he relied upon the defendants' skill and judgment to supply water reasonably fit for that purpose, and the defendants impliedly warranted that the water supplied by them to the adult plaintiff was reasonably fit for that purpose. Further, or alternatively, the defendants were under a duty to take reasonable care not to supply to the plaintiffs water which was, or was likely to be, injurious to health if used for drinking purposes. Between Sept. 24, 1937, and Nov. 3, 1937, the defendants negligently and in breach of warranty supplied the plaintiffs with water which was impure, unwholesome and unfit for the purposes for which it was supplied, in that it contained the typhoid bacillus. Further, or

alternatively, the defendants committed a breach, or breaches, (a) of their duty under the Waterworks Clauses Act, 1847, s. 35, to provide and keep in their pipes a supply of pure and wholesome water sufficient for the domestic use of the inhabitants of the borough, (b) of their duty under the Public Health Act, 1936, s. 115, to secure that the water supplied for domestic purposes from their waterworks was wholesome, and (c) of their duty under the Public Health Act, 1936, s. 111, from time to time to take such steps as were necessary for ascertaining the sufficiency and wholesomeness of the water supplies within their area. In the further alternative, the matters complained of constituted a nuisance. A

The defence alleged that the adult plaintiff, in taking the said supply, did not make anything known to them, by implication or otherwise, and denied that he relied upon the defendants' skill or judgment, that the defendants warranted as alleged, or at all, that they were under any statutory or other duty. Alternatively, if they were under any such duty, their duty was to take due and reasonable care to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of the inhabitants of the said borough, and that, if they were under any duty under the Public Health Act, 1936, s. 115, their duty was to take due and reasonable care to secure that the water in any waterworks belonging to them from which water was supplied for domestic purposes was wholesome, and that, if they were under any duty under the Public Health Act, 1936, s. 111, their duty was from time to time to take such due and reasonable steps as might be necessary for ascertaining the sufficiency and wholesomeness of the water supplies within their district. In the further alternative, it was alleged that the statutes referred to did not confer any right of action upon the plaintiffs, or either of them, for any such breach or breaches, or, alternatively, the statutes excluded any such right of action. B C D E

The facts are fully set out in the judgment. F

H. J. Wallington, K.C., Sylvester Gates and Dennis Lloyd for the plaintiffs.

Sir Walter Monckton, K.C., John Morris, K.C., and H. M. Pratt for the defendant corporation.

Wallington, K.C. : The failure on the part of the defendant corporation to take samples of the water and to appreciate the need for adequate chlorination and filtration, coupled with the omission to have the workmen employed at the Addington well medically examined, constitutes negligence. Furthermore, as water, when appropriated by the consumer to his use, becomes his property, a contract to supply water is a contract for the sale of goods. Any such contract contains an implied warranty that the water shall be fit for the purpose for which it is supplied. Even apart from the Sale of Goods Act, there is a contract to supply water, and this contract equally contains an implied warranty. The adult plaintiff, being a party to one or other of these contracts, must G H

be entitled to recover his special damage under this head. The obligations imposed by the Waterworks Clauses Act, 1847, s. 35, and the Public Health Act, 1936, ss. 111, 115, are absolute, and the rights accruing from a failure to fulfil them are not confined to the adult plaintiff, who is a ratepayer, but extend to all the members of his household.

A Therefore the adult plaintiff's claim is rightly based on negligence, contract and breach of statutory duty, and the infant plaintiff's claim is rightly based on negligence and breach of statutory duty.

Monckton, K.C.: As regards the question of negligence, the court has to judge events in the light of the knowledge at the defendants' disposal at the time of the outbreak of the disease, and not in the light of the knowledge which the defendants have acquired through their subsequent experience after the outbreak of the disease. No contract exists between the parties in the present case. As far as the question of a breach of the defendants' statutory duty is concerned, the Acts only provide for a penalty to be imposed upon those failing in their duty, but they exclude the right to bring a civil action. Even if it were possible to bring such an action, this could only be done at the instance of a ratepayer. Furthermore, the obligation to supply pure water is not an absolute one, and no action can lie unless there is a lack of reasonable care on the part of the defendants.

STABLE, J.: This is an action against the mayor, aldermen and burgesses of the county borough of Croydon (hereinafter referred to as the corporation) for damages arising out of an epidemic of typhoid fever in the borough in the months of October and November, 1937. The plaintiffs are Alfred Read, who was at all material times a ratepayer and the occupier of a dwelling-house in the borough known as 44, Croham Park Avenue, and his infant daughter, Patricia Rosemary Read, a young lady now about 15 years of age, who sues by her father as her next friend. Miss Read developed the infection on or about Nov. 14, 1937, but Mr. Read fortunately escaped, so that his claim is limited to the special damage he incurred in connection with, or arising out of, his daughter's illness, while Miss Read's claim, as the special damage has all been incurred by her father, is limited to general damages. So far as figures are concerned, the items and amounts of special damage, with one exception, have been agreed. The legal bases on which these claims are rested are four—namely, (i) for breach of a contract for the sale of goods with the warranty imported by the Sale of Goods Act, 1893, s. 14, (ii) for breach of contract for the rendering of services with a similar warranty, (iii) for breach of statutory duty, and (iv) for common law negligence. The first two causes of actions are peculiar to Mr. Read, while the claims founded on statutory duty and negligence are common to the two plaintiffs. It is important to remember that, although many factors are common to both plaintiffs, there are two plaintiffs before the court, to whose respective claims different considerations of law may be applic-

able. The present case is a test case, inasmuch as it has been agreed between the corporation and certain other persons who also contracted typhoid fever, and who have taken proceedings against the corporation, that the findings of fact and law, so far as they are applicable, shall be treated as decisive of these additional claims.

Before considering the questions of law which arise, it will be convenient A
to give a short summary of the material facts and the inferences of fact
which I draw from the evidence that has been called and from the
admissions that have been made. My task in this respect has been
considerably simplified by the attitude adopted by the corporation. B
Instead of adopting a defensive and obstructive position, and leaving
the plaintiffs to ferret out and prove as much or as little of the material
facts as they were able, the corporation has, wherever it has been possible
to do so, made the fullest and most candid admission of all material
facts, so far as they were capable of ascertainment. In my view, this
course, in connection with litigation arising from a situation which C
everybody concerned deplores, is wholly commendable. The difficulties
in arriving at the truth as to what really happened have been further
diminished by the action taken by the corporation and its officers immediately it was known that there was an outbreak of typhoid in the borough. D
Every effort was made to discover the origin of the infection and to
expose any weakness in the system of administration, regardless of the
consequences which such an investigation might have for the persons
who were, or might be, directly or indirectly responsible, and on whose
sense of public duty the success or failure of this investigation largely
depended. In making an investigation, which proved to be the instrument E
which brought the onslaught of the epidemic to a standstill in its
very early stages, the officers of the corporation put the public safety in
front of their own private interest, or, rather, they subordinated every
consideration of private interest to the paramount necessity of finding
out the truth. I have no doubt that the action of the corporation has F
more than restored any loss of confidence the public may have experienced
in its administration of these important health services.

In the months of October and November, 1937, there was an outbreak
of typhoid fever in the borough of Croydon. The majority of cases
occurred in that part of the borough which was served by what is known G
as the high-level water supply. As soon as the seriousness of the outbreak
became apparent, immediate, energetic and single-minded steps
were taken by the corporation and its officials, assisted by the Ministry
of Health, to trace the infection to its source. These measures were
speedily effective, with the result that, though the first onslaught of the H
epidemic was alarming, it was short-lived, and by the end of November
the notification of fresh cases had declined practically to vanishing point.
The period when the disease was at its height was during Nov., 1937.
Throughout the whole period of the epidemic there were 322 primary
cases, 19 secondary cases. The deaths numbered 43. It is now admitted

that the infection was water-borne, and that the infant plaintiff contracted typhoid fever as a result of drinking water supplied to her father's residence by the corporation.

The corporation, among its numerous activities, is, and was, the undertaker supplying water to the borough in the exercise of certain statutory powers to which I shall refer later. The water is derived from a number of different sources. The system with which we are particularly concerned is known as the high level water system, which supplies those parts of the borough which stand on rather higher ground than the rest. The water consumed in the high level area is brought from the Addington reservoir, a service reservoir fed from two wells, the Stroud Green well, and the Addington well. The larger part of the water received by this reservoir in the ordinary course is derived from the Addington well, the normal proportion being, when both wells are in action, 1,000,000 gallons a day obtained from the Addington well, and 650,000 from the Stroud Green well. The water from the Stroud Green well has been proved to have had no connection whatever with the epidemic, and it follows that the infection, which was admittedly water-borne, was either an infection present in the Addington well or one which came into the system at some point between the Addington well and the actual reception of the water by the several inhabitants. It was, I think, expressly admitted in the course of the hearing before me that the infection, whatever its origin may have been, was an infection that was present in the Addington well. If no express admission to that effect was made, the case at least proceeded tacitly on that basis. In any event, I am satisfied by the evidence that the typhoid infection which brought about Miss Read's illness was present in the Addington well at some time during Oct., 1937.

Prior to 1882, when the corporation was brought into being by Royal Charter, a supply of water had been given to the inhabitants by the then appropriate authority. In 1884, the corporation obtained a private Act of Parliament creating powers and obligations in connection with the supply of water. In the exercise of these powers, the Addington well was sunk in or about 1888, and, from that time until the epidemic in 1937, water was supplied to the inhabitants from this source without any ill effects. The well is a well sunk in the chalk strata, and derives its supply of water from a gathering ground some 2,400 acres in extent lying immediately to the south of the well. This gathering ground, which was the object of some criticism on the part of the plaintiffs, is not, from the point of view of the expert whose only consideration is the supply of perfectly pure water to the public, an altogether ideal area. In this imperfect world in which we live, the ideal area which would emerge wholly unscathed from the criticism of the experts is, and will remain, non-existent. In broad outline, as was explained to me by the very eminent geologist, Professor Hawkins, who gave evidence, the gathering ground consists of two ridges of high ground with two valleys running approximately north and south. The rain tends to run down from

the tops of the ridges, where the soil is of an impervious character, until it reaches the chalk in the valleys, where it soaks into the ground, after which, by means of fissures and subterranean channels in the chalk, it runs in a northerly direction until it is caught by the adits—a term used to describe the horizontal openings or tunnels cut out from the side of the well so as to trap and collect for the well the flow of subterranean water. This gathering ground, as must be inevitable in so large an area so near to such an important borough as Croydon, to say nothing of other large and populous communities in the vicinity, is not uninhabited. None the less, a very great part of the ground consists of woodlands and other open spaces. Only a small fraction—that in the northerly part of the area—lies within the geographical boundary of the corporation. The remainder falls into two rural and one urban district.

There were on the gathering ground at the material time certain possible sources of pollution. Among these were a number of houses with cesspools. At St. Giles' School there was a latrine provided for workmen. At one point about the middle of the gathering ground, there is a pig farm, and further south is the Croydon Mental Hospital. That the gathering ground might be a possible source of infection had been apparent to, and appreciated by, the corporation for many years prior to the outbreak, and, in order to eliminate or minimise the risk from this quarter, the corporation acquired a large area of land, now dedicated to the game of golf, in immediate proximity to the well. The mental hospital was linked up with a proper system of sewers, and steps were taken to improve the filtering capacity of some low-lying land from which it was feared that impurities might reach the well. My attention was arrested by a report by the borough engineer, submitted to the corporation in May, 1907. In the course of this report, he says :

The growth of population on the chalk renders it more and more necessary to provide safeguards against the consumption of polluted water drawn therefrom. The Croydon supply is noticeably affected in the day following a heavy downpour of rain, and the attention of the committee has been drawn by reports and analyses of the water on many such occasions.

As far back as 1906, a sample of water from the Addington supply was described by the analyst as distinctly objectionable, and there are other passages from the documents which establish beyond any question that the risk of infection from this source was a possibility that had been brought to the mind of the corporation for a period of many years. In fairness to the corporation, it should be stated that it was not inattentive to these warnings. In addition to the steps taken for the improvement of the gathering ground, other precautionary measures were adopted. For example, an ozone plant was installed in Apr., 1908. Subsequently, when chlorine treatment of water began to come to the front, the committee of the corporation seem to have been in the vanguard of those who were awake to the advantages of this method of purification, as appears from a minute dated Feb. 20, 1914, in which reference is made to certain experiments which were made in connection with the process. On

Sept. 16, 1927, there is in the minutes a recommendation to the borough engineer for the construction of a plant of high-pressure filters and the addition of a chlorine plant to secure sterilisation. This installation was made in or about 1928, and in 1936 the chlorine plant was further improved by the addition of ammoniating plant, which mitigates, if it does not wholly remove, the unpleasant taste of chlorine, and diminishes the quantity of chlorine necessary to produce effective results. In or about 1937, some £13,500 was spent in the acquisition of land in the gathering ground. This short summary indicates that the corporation, through the appropriate committee and the responsible officials, was not only alive to the possible dangers, but was also taking the appropriate steps to reduce such dangers to a minimum.

To complete the story of the water from its descent from the skies, in the form of rain or mist or otherwise, to its arrival in a Croydon household, the water, when caught up in one of the adits to the Addington well, is collected in the well, whence it is pumped by one or both of two pumps standing immediately to the north and south of the well, and driven through pipes to a high-pressure filtering station, the primary object of which is to remove any solid matter that may be present in the water. After passing the filters, it goes through the chlorinating plant, and so back to what is called the filtered water-tank, whence it is driven through pipes into the Addington service reservoir, whence it is carried through the mains to the various points of ultimate distribution and consumption. At the material time, the reservoir, which had been constructed in 1888, consisted of a large subterranean chamber, roofed, probably, with concrete covered with a layer of asphalte three-quarters of an inch thick. Between the roof and the ground level was a depth of soil varying from 1 ft. 6 ins. to 3 ft. 3 ins. The surface above the reservoir was, and had been since the reservoir was first constructed, open to the public. There was on the site a pump-house, which contained a water-closet, and which was inhabited by one of the corporation officials. From this building, refreshments were served to the public. A somewhat microscopic criticism was directed to the reservoir and its surroundings, but I was not satisfied by the evidence that there was in this respect any absence of the requisite care or skill on the part of the corporation or its officials. If in this respect I have taken a too lenient view of the facts, the matter is immaterial, since I am quite satisfied that the point of entry into the water system of the infection which was the cause of the outbreak of typhoid fever was at a point before the water reached the reservoir, with the result that, even if there had been neglect on the part of the corporation in relation to the reservoir—and, in my view, there was not—that neglect was not the cause of, and, indeed, had no connection with, the epidemic. It is reassuring to know that after the epidemic the corporation, after receiving advice from two highly qualified gentlemen, adopted in full the recommendations made in relation to the reservoir, so that each item to which criticism has been directed has

now been brought to a standard as near perfection as can be. For the reasons I have stated, it becomes unnecessary to deal in any detail with the evidence directed to the reservoir itself.

For a considerable period prior to the outbreak, a periodical analysis of the water had been made. These analyses had been taken once a month, with, I think, the exception of the month of July, when, owing to the holiday season, there was an interval of two months between the analyses. Up to a date in Apr., 1937, the practice was to take an analysis, so far as is material to the present case, of two waters—namely, the water in the Addington well before it had been subjected to any treatment by filtration or chlorination, and the water of the reservoir, which consisted in part of water from the Stroud Green well and in part of water from the Addington well, the latter after it had been subjected to such treatment as from time to time it received. Each of these analyses was, in my opinion, an essential precaution, and was complementary to the other. The first point of analysis indicated the precautions that were required to render what I may describe as the raw water fit for human consumption, and the second showed whether the precautions taken had proved effective or not. Criticism was directed to these analyses on the ground that they were not taken with sufficient skill, but this point was not driven home, and I was not satisfied that there was any ground for complaint as to the character of the analyses themselves, the qualifications of the analyst, or the method of taking the samples.

Reverting to the sequence of events which immediately preceded the outbreak of the epidemic, at the end of 1936, certain work was begun in the Addington well, in the course of which, by an unfortunate accident, the skip which was used for letting the workmen into the well came off its hook, and fell on, and killed, one of the workmen. This work, then in its initial stages, was in consequence postponed, and was resumed in Sept., 1937. The work fell into two parts. The first operation, which began approximately on Sept. 24, 1937, and was finished on Oct. 16, 1937, which happened to be a Saturday, consisted in driving a short cutting from one of the higher level adits so as to link it up with one of the lower level adits at a point where a cavity or depression had been formed in the floor of the upper adit. This cavity or depression was the cause of the accumulation of silt, and the operation was designed to remove this imperfection. This operation was carried out over a small area approximately 100 yds. distant from the well itself. While it was in progress, the water from the well was pumped to waste when work underground was actually going on. When the work for the day stopped, and the workmen had come up from the well, after a short interval of slightly more than half-an-hour, to enable any disturbance that might have been caused in the water to subside, the water was pumped into supply. Oct. 14 was the last day on which Mr. Brandram-Jones, the chief water assistant, was present on the job. He left to take up a position of re-

- sponsibility with the Brighton Corporation in connection with their water supply. This position, I am happy to say, he still holds. Although in the course of this judgment criticism is directed in particular to one decision for which Mr. Brandram-Jones was in some measure responsible, he was, in my judgment, fully qualified for the position he held, and a public servant of integrity. Nothing emerged in the evidence before me in any way to diminish the confidence which his present employers have hitherto reposed, and I hope will continue to repose, in him. Mr. Brandram-Jones was, in my judgment, very largely the victim of the imperfect and inadequate system of control in force during the period of his employment with the corporation. On his departure, the senior officer directly in charge of the work was Mr. Ellis, a supervisor, and it was on his instructions—acting, as he honestly believed, in accordance with the wishes of higher authority—that the water was pumped direct to supply on and after Oct. 16. I formed a favourable impression of Mr. Ellis, but, in my judgment, a decision of so vital a character ought not to have been left to be determined by a man in his position, nor can I do anything but condemn a system, or lack of system, under which such a decision one way or the other could have been taken without at once being brought to the notice of the persons at the head of the chain of responsibility.

- The second operation was rendered necessary by a defect in one of the pumps. Before this defect could be remedied, the pump had to be put out of action, leaving the whole brunt of pumping from the well to fall on the second pump. In order to diminish the quantity of water to be pumped, two of the adits were bricked up in close proximity to the well, and a sluice or valve was inserted in each of these barriers so as to enable the water to be held up in the adits and prevent it from coming into the well. This operation began on or about Oct. 16, and was either finished or broken off on or about Nov. 3, 1937. While the second operation was in progress, the whole of the water was pumped to supply, irrespective of whether the men were actually working in the well or not.

- Eighteen men were employed on these two operation, each of whom had been previously in the employment of the corporation. Some of them had not been employed on work connected with the water supply, but this fact I regard as unimportant. None of the men so employed was medically examined. The sanitary arrangements available for the men engaged on these duties were as follow. Instructions were given to them to be careful to use the lavatories provided on the surface immediately before a particular shift began. Any man who required to relieve himself while the work was in progress was required to come to the surface for the purpose, and no facilities were provided below ground, with the exception that on some few occasions an open bucket, which contained no chlorine or other disinfectant, was let down by the skip to enable a workman to urinate. Among the workmen so employed

was one who has been referred to throughout these proceedings as Case A. He had been in the employment of the corporation since 1921. So far as the evidence that was called before me shows, throughout the whole of that period there was nothing to indicate that he was not a perfectly fit and proper person to work in close proximity to the water supply. The searching investigation which immediately followed the discovery that an epidemic of typhoid fever was present in Croydon revealed that during the War he had suffered from typhoid fever, and that he was what is known as a carrier of the disease. Neither the corporation nor any of its officers, nor the man himself, either suspected or had reason to suspect this fact, but a blood test and subsequent examination of the *fæces* disclosed that Case A was a typhoid carrier. It should be remarked in passing that this fact was established only by the examination of the *fæces*, and that, although ten tests were taken of the urine, in each case the test gave a negative result. A B

Turning to a matter which I regard as of cardinal importance in this case—namely, the filtration and chlorination of the water—the following facts were proved or admitted. In May, 1936, the attention of the medical officer was directed to an analysis of the Addington water taken on Apr. 24, 1936. He regarded the presence of the *bacillus coli* as not very satisfactory, and formed the opinion that the filtration of the water was not entirely adequate. Apparently at that time, although the chlorinating plant had been installed as far back as 1928, it was not in regular use. The borough engineer replied, pointing out that a chlorinating apparatus was installed, and that, if the medical officer of health considered it necessary, it could be put into operation, but added: “I think if possible it would be better to avoid this.” There is a memorandum, dated July 18, 1936, by the chief water assistant to the borough engineer of which the material passage is as follows: C D E

I would like to put on record that I have for the last two months been of the opinion that chlorination should be in regular use in view of the analyses received. F
The importance of this memorandum is twofold. It indicates that no steps had been taken during the preceding two months, notwithstanding the apprehension expressed by the medical officer of health, and that the chief water assistant, who, although subordinate to the borough engineer, was the senior official directly and exclusively concerned with the supply of water, had then formed the opinion, which he took the precaution of placing on record, that, in view of the analyses received, chlorination should be in regular—not intermittent or spasmodic, but regular—use. G
In view of all the then existing facts, and not regarding the matter in the light of after events, this is an opinion in which I entirely concur. H

On July 20, 1936, the practice of chlorination began. The dose was fixed by the medical officer of health at .05 of a pound to 1,000,000 gallons, a dose which, to adopt the phrase used by the witnesses, was stepped up from time to time, either when there was a deterioration in the analyses or to meet some sudden and unexpected emergency, such as on the occasion

when the workman was killed in the well. Some evidence was directed to show that this dose was ineffectual. I was not satisfied that this criticism was well founded, but the point is immaterial, because this dosage, effective or not, was discontinued when circumstances most demanded it. If it had been maintained, and had proved worthless, the

A responsibility would shift from the shoulders of those who, for no sufficient reason, neglected a precaution hitherto in force on to the shoulders of those who, from lack of care or skill with the means of ensuring adequate safeguards, had adopted a precaution that was ineffective. No log book was kept showing whether or not chlorination was in force at any particular time, or, when it was in force, the dosage that was adopted. It is obvious that the practice of chlorinating the water, or of increasing the dose after, and in consequence of, an unsatisfactory analysis, was not satisfactory, inasmuch as the chlorination was thus used as a remedy for an existing evil, rather than as a preventive of a potential danger which

B the experience of years had proved to threaten.

One striking example of the laxity with which this all important question of chlorination was treated is shown by a memorandum of Mr. Brandram-Jones, the chief water assistant, dated Nov. 13, 1936, to his subordinate Mr. Ellis, directing the latter to increase the rate of chlorination until further notice, as a result of the analysis taken on

D Oct. 30, which showed a greatly increased concentration of bacillus coli, etc.—I quote from the memorandum—which analysis had apparently only come to the notice of the responsible officer a fortnight after it had been made. This breakdown of the system in force seems to have escaped

E the criticism, and, indeed, the observation, of the responsible committee. The matter does not rest there. At the end of Apr., 1937, the practice of taking an analysis of the raw water at the Addington well was abandoned. No explanation has been afforded me as to why this decision was taken, if, indeed, it was a considered decision, or by whom it was taken.

F On the contrary, the evidence establishes to my satisfaction that this analysis was dropped by a mere oversight, and that neither the chief water assistant nor the borough engineer nor the water committee nor, indeed, any responsible person or body so much as even noticed that what I regard as a necessary practice, which presumably was so regarded

G by the responsible persons by whom it had been initiated and carried out for a period of ten months, was allowed to drop. The most disquieting feature of all, in my judgment, is that on Sept. 17, 1937—that is to say, a week before the work in the adits and the well was begun—the practice of filtering and chlorinating the water was wholly abandoned during the

H whole of the period when the workmen were working down the well. The presence of the workmen, in my judgment, demanded not a total abandonment of the then existing precautions, but rather a tightening up of the precautions that were normally taken.

Chlorination of the water was resumed on Nov. 1, 1937, when a dose of 0·18 of a pound was applied to the water, as a result of the knowledge

that typhoid had broken out in Croydon. It is a significant fact that there was no primary case of infection which, so far as there can be any certainty in these matters, could have been contracted after Nov. 4.

I have now concluded a summary of the conditions prevailing at the time when the epidemic broke out. Before I come to consider the questions of law involved, I must first determine whether, in my judgment, the plaintiffs have established that there was in fact, on the part of the corporation, negligence which was the direct cause of the outbreak. I use "negligence" in the sense of a lack of that care and skill to be attributed to a body which has undertaken the supply of water to a community such as Croydon in the course of the actual exercise of its functions, and not merely as a failure to carry out a duty imposed by statute. In my judgment, negligence in that sense has been conclusively established.

The corporation, like, I suppose, every body of its kind, delegates the discharge of its various functions to committees of its members, who at once control, and are assisted by, the officials, workmen, and servants in the employment of the corporation. The committee responsible for the supply of water was known as the water committee. The senior officers responsible for the water supply were Mr. Boast, the borough engineer, and Mr. Brandram-Jones, who up to Oct. 14 was the chief water assistant. There were, in addition, supervisors, foremen, and workmen engaged in the operations incidental to the running of the waterworks. In addition, there was the medical officer of health to advise on any technical matters which fell within his sphere and which were brought to his knowledge. So far as the evidence before me showed, all these officers were men who were qualified for their work, and I find no trace anywhere of that degree of negligence which, arising either from indifference, inefficiency, or lack of a sense of responsibility, amounts to a deliberate dereliction of duty.

Sir Walter Monckton, in the course of an argument to which I am indebted, pointed out with great force the extraordinary combination of circumstances which almost certainly led up to the outbreak of the epidemic, and he submitted that, so utterly remote was the possibility of that happening which did happen, it was impossible to convict any body or person of negligence for not having foreseen what took place. He further stressed the danger of being wise in the light of after-events, and of falling into that error of assuming that people ought to have known, before something took place, what we, who are now dealing with the thing after it took place, cannot help knowing. I have felt to the full the force of those observations, and, in coming to the conclusions I have done, I have been on my guard to measure the care and skill that, in my judgment, were required, not in the light of what we know in Oct., 1938, but in the light of the experience of the men on the spot in the autumn of 1937. In my judgment, it has been conclusively proved that the epidemic was caused either by an infection brought into the

water by the carrier in the well while the work was in progress in Oct., 1937, or by some unidentified, and probably transitory, condition in the gathering ground. The former of these two alternatives, though it is a fact that cannot be established with absolute certainty, was, in my judgment, almost certainly the manner in which the infection was introduced. The other possibility, and it is a bare possibility—namely, that the infection arises perhaps in the excrement of a passer-by which was washed down from the gathering ground by the subterranean flow of water, and was present in the well at the same time as a carrier of typhoid fever was working in close proximity to the water—extends the well-nigh limitless possibilities of coincidence almost to infinity. For the purposes of this case, whichever of the two sources was the origin of the infection, the consequences would have been avoided if the protective apparatus available on the spot had been made proper use of.

I have already dealt with the criticisms directed to the reservoir and to the gathering ground. As to the latter, while I acquit the corporation of any lack of reasonable skill or care in what they did or omitted to do in connection with it, I am satisfied that, by the very nature of the ground itself, it was a potential source of danger, and was known so to be to the corporation and to its responsible officers. Moreover, there was throughout the machinery available, which was fully adequate to eliminate any danger from the gathering ground if and when the presence of the danger was apparent. Certain criticisms were directed against the responsible officers for the sanitary arrangements made for the workmen while they were working in or near the well. In my judgment, these criticisms were not substantiated. I am satisfied that the officers concerned brought to bear on this problem instructed and responsible consideration, and that the solution they came to was a proper, although it was not the only proper, solution of the problem with which they were confronted. Further criticism was directed against the absence of a medical examination of the workmen, the method of their selection for the work, and the supervision over them while they were working. In my judgment, none of these criticisms was made good. As regards the absence of medical examination in the form of a blood test and subsequent examination, if the blood test indicated its desirability, of the fæces and urine, the plaintiffs, with all the wealth of expert testimony which they had at their command, were able to establish one solitary instance in which an epidemic of typhoid could be directly traceable to a carrier. This instance happened at Caterham as far back as 1879, and in that case the carrier was a man who, while he was working in close proximity to the water that became infected, was actively suffering from the disease, and was freely and constantly defecating. There was one other instance, and one alone, in which it was suggested that an epidemic might have been caused by a carrier. I was told that there was a gap in the evidence. When the matter came to be more closely examined, it transpired that the suspected carrier gave an absolutely

negative reaction to all the tests that were made, but it was suggested that he might have been proved to have been a carrier if a further test, which was not taken, had been taken. This indicates, in my judgment, not a gap in the evidence that this particular epidemic was caused by a carrier, but an entire absence of any evidence of that fact. In the present case, the carrier had suffered from typhoid during the European war, which must have been at least 19 years before he was working in the well, and 3 years before he entered the service of the corporation. Dr. Eyre, who gave evidence, speaking from an experience which must be almost unparalleled on this particular topic, stated the maximum period during which a person who had suffered from the disease remained a carrier, so far as his knowledge went, as 10 years. In my judgment, due care and skill were taken in the selection of the men, and I was satisfied that the superiors under whose supervision they were working were conscientious, responsible, and trustworthy in the discharge of these duties.

While the probabilities, looked at from the point of time immediately preceding these happenings, that the water could be infected by Case A were utterly remote, the bacteriologist or water engineer responsible for the supply of water to an urban community, if he discharges his duties properly, must be constantly on his guard against innumerable risks. Though the chance of any one of the risks materialising into a peril is remote, collectively and in the aggregate the danger is real and substantial. In my judgment, the corporation—and I use the term comprehensively—failed in its duty in two major respects. From July, 1936, when the chlorinating plant first came into use, the extent to which this precaution was enforced was haphazard, ill-considered, and inadequate. The decision, at the moment of greatest peril, when the water was being put into supply while the men were working in the well, to omit the customary precautions of filtration and chlorination, looked at, not in the light of what we know now, but in the light of what was known then, was, in my judgment, inexcusable. It is not for me to apportion responsibility among individuals. *Prima facie*, the responsibility must rest on the shoulders of the water committee, to which body was entrusted the general superintendence of this important public service. Throughout the whole of this case, no evidence was adduced before me to indicate that any one member of that committee made any inquiry, or took any step whatever, to formulate any established policy in connection with chlorination, or to set up machinery to put that policy into effect, or to provide a proper system of supervision and inspection to secure that any policy that was adopted was being efficiently, regularly, and systematically carried out. In these circumstances, where the responsibility *prima facie* rests, there I propose to let it lie.

Sir Walter Monckton further urged, and again with great force, that the policy of chlorination in connection with chalk wells was of comparatively recent origin, and was by no means universally liked. The

trouble in this case, in my judgment, largely originated from the fact that on this all-important question there never was a settled policy at all. While I have absolved the corporation and its servants from every charge of negligence brought in connection with the gathering ground and the selection and supervision of its workmen, and the conditions under which they worked, these facts cannot be segregated from the other established facts in this case. If some paramount and overriding necessity existed—and I find that there was no such necessity—which demanded that water should be pumped in its crude state straight to supply while work was in progress in the well, then the additional risk to the health of the people of Croydon which was thus inevitably created ought to have been counteracted by additional precautions designed to obviate the possibility of infection being introduced into the water by the close proximity of the workmen. These precautions, which might have taken the form of continual analysis, searching inquiry into the antecedents of the men engaged on the work, and incessant supervision while they were so employed, were not taken. No one made it his duty to inquire whether or not they were taken, or to see that the precautions, if they had been adopted, were observed. The system in this respect proved itself inadequate to support the very heavy burden of responsibility which it had to carry.

Turning now to the questions of law involved, the first ground on which the plaintiff, Mr. Read, founds his action is on the footing that there was between him and the corporation a contract for the sale of goods, in the form of the water supplied by the corporation to his house, in which case the warranty or condition contained in the Sale of Goods Act, 1893, s. 14, would have applied. Alternatively, he said that, if the contract was a contract for services, or a contract for the sale of goods and for services, a similar warranty must be implied in the contract. In my judgment, whether the contract, if there was a contract, was a contract for the sale of goods or for services, or for the sale of goods and services, such a contract, in the circumstances of the present case, would contain either the warranty or condition contained in the section or a warranty or condition to the like effect. In order to succeed on this ground, the plaintiff, however, must establish that there was a contract, and, in my judgment, he has failed to establish the existence of a contract. In the Croydon Corporation Act, 1884, s. 28, there are words which indicate that the corporation would or might contract with the persons to whom it supplied water for domestic purposes. Sect. 35 of the same Act envisages the possibility of a person entering into a contract with the corporation for a supply of water to him. The actual position was, however, as follows. The corporation on its side, having undertaken the supply of water to the inhabitants of the borough, was by the provisions of the Waterworks Clauses Act, 1847, s. 35, under the statutory obligation to provide and keep in its pipes a supply of pure and wholesome water sufficient for the domestic use of the inhabitants who fell within

a certain category. Under sect. 53 of the same Act, each owner and occupier of a dwelling-house within certain geographical limits, when the appropriate pipes had been provided, who had paid or tendered the water rate, was entitled to demand and receive from the corporation a sufficient supply of water for his domestic purposes. The consideration for the supply of this water was in the form of a water rent or rate chargeable under the Croydon Corporation Act, 1884, ss. 26, 27, 28. This rate was payable half-yearly in advance, and was quantified, not in relation to the water taken in any preceding period, or to be taken for the period to which the rate applied, but on the rateable value of the house to which the supply was brought. The rate was payable irrespective of the amount of water consumed, and, indeed, irrespective of whether or not any water was consumed. In my judgment, such a relationship, although rights and obligations may be created thereunder similar to, or identical with, rights which may be created by contract, is not a contractual relationship, but a relationship between two persons under which one is bound to supply water, and the other, provided he has paid the equivalent rent, is entitled to receive it, these obligations and rights being throughout the creation of statute. In support of his proposition, Mr. Wallington cited certain authorities, but they did not, in my judgment, carry the matter far.

Ferens v. O'Brien (1) establishes that water may become a chattel so as to be the subject-matter of larceny. Exactly at what point water, from the time when it drops from the clouds and passes through a water-works undertaking into domestic consumption, assumes the quality of a personal chattel it is unnecessary to decide, for the reason that, as I have already stated, whether or not the water in question was a personal chattel at the point of time and space which is material does not matter, since, in my judgment, there was no contract between the parties in relation thereto. The view I have formed in principle on this point is, I think, supported by the authority of *Milnes v. Huddersfield Corpn.* (2), a case decided under a private Act containing provisions identical with those set out in sects. 28, 35, of the Croydon Act to which I have already referred. LORD COLERIDGE, L.C.J., delivering the judgment of the Court of Appeal, said, at p. 451 :

If it be a matter of contract, which I think it is not, they have performed the only contract they undertook to perform.

In the same case on appeal to the House of Lords, the EARL OF SELBORNE, said, at p. 523 :

It is true that this is a case of statutory obligation, not properly of contract; although LORD ELDON and other great judges regarded Acts of Parliament of this class, giving powers to promoters or undertakers who solicit them, and who are to receive remuneration in money for what under those powers they supply, as Parliamentary contracts with the public, or at least with that portion of the public which might be directly interested in them.

In *Clegg, Parkinson & Co. v. Earby Gas Co.* (3), WRIGHT, J., said, at p. 595 :

The obligation of the company, if any, depends on statute and not upon contract.

In *Re Richmond Gas Co. & Richmond (Surrey) Corpn.* (4), MATHEW, J., in deciding a somewhat similar problem, said, at p. 59 :

We do not derive much aid in answering this question from cases arising on contracts.

A In *G. Scammell & Nephew, Ltd. v. Hurley* (5), an action for conspiracy to procure a breach of a statutory duty to supply electricity, in which case there was a contract entered into between the parties to give effect to, and to regulate, the performance of the statutory duty, SCRUTTON, L.J., said, at p. 434 :

B The case is like the *Southend* case (6), where the contract and the statutory duty are the same, and the claim is not made any better by being disguised as procuring the authority to break a contract.

C Mr. Wallington cited as points in the contrary direction a passage from the opinion of LORD WATSON in *Rothés (Countess) v. Kirkcaldy Waterworks Comrs.* (7), at p. 707, but this passage does not, in my judgment, mean that a relationship forced on two persons by Act of Parliament is contractual, but only that the consequences and incidence of such a relationship are, or may be, the same as though they had been undertaken voluntarily by contract, and not compulsorily by process of law.

D The second question is as to the scope of the statutory duty. This question falls into two parts—namely, the class or category of persons to whom the duty is owed and the scope of the duty itself. It is to be observed that the Waterworks Clauses Act, 1847, creates a number of duties, and it may well be that the persons, or classes of persons, entitled to enforce them differ in relation to the particular duty to be enforced.
E The duty with which we are concerned is that created by sect. 35 of the new Act, the words of which, so far as they are germane to this matter, are as follow :

F The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay a water rate for the same. . . .

In my judgment, the words "sufficient for the domestic use of all the inhabitants" do not define the class to which the duty is owed, but prescribe the quantity and quality of the water to be supplied. The
G solution to this problem is, in my judgment, to be found in sect. 53, since the class of persons entitled to demand water must be the same as the class of persons to whom the duty to supply the water is owed. Sect. 53, omitting immaterial words, provides that every owner and occupier of any dwelling-house shall, when he has laid the necessary
H communication pipes and paid or tendered the water rate, be entitled to demand and receive a sufficient supply of water for his domestic purposes. The plaintiff Mr. Read falls into this category, but the infant plaintiff does not. I accordingly hold that, while there was a statutory duty owed by the corporation to Mr. Read, there was no statutory duty owed to his daughter.

As to the scope of the duty, Mr. Wallington contended that the duty was absolute. Sir Walter Monckton, on the other hand, contended that, though the words "shall provide and keep a supply of pure and wholesome water" were capable of bearing a construction imposing an absolute duty, they must be construed to mean "shall take all reasonable steps to provide and keep." There are a number of Acts of Parliament containing language imposing an absolute duty where it has been held that the duty is absolute, and others containing similar language where it has been held that the more restricted meaning must be placed on the words. The principle is stated in *Hammond v. St. Pancras Vestry* (8), in which case it was held that the duty imposed by the Metropolis Management Act, 1855, s. 72, was not an absolute duty, but only the duty of using all reasonable care and diligence to do what the statute enjoined. BRETT, J., as he then was, said, at p. 322 :

The question therefore is what is the proper construction of the Act of Parliament. . . . The words of sect. 72 are susceptible of either meaning, that an absolute duty is cast upon the defendants, or that they are only bound to exercise due and reasonable care. What, then, is the proper rule of interpretation? The defendants are a public body having a duty imposed upon them by Parliament to do a thing which even with the exercise of the utmost care and diligence may not always be capable of being done. . . . It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute; but, if so, it ought to be imposed in the clearest possible terms. The intention of the legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed.

An examination of the reported cases where the duty has been held to be absolute shows that, speaking broadly, they fall into one of two classes. The first class is statutes where certain means are directed to secure a particular end. Examples of this class can be found in the legislation designed to ensure the safety of persons working in mines and factories and the like where the statute directs that certain means to secure those ends must be adopted. In those cases, there is no obligation on the owner of the factory or the mine to carry on business, but, if he does so, the means which the statute enjoins for the protection of his workpeople must be observed, and the duty is absolute. The second class is where the statute enjoins the end but not the means. A typical example of the second class is the Food and Drugs (Adulteration) Act, 1928, s. 2, which provides that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature or not of the substance or not of the quality of the article demanded by the purchaser. Here, again, there is no obligation imposed on the vendor of food or drugs to carry on business. Moreover, in the purveying of food and drugs, it is possible for the vendor to exercise a degree of control over the article sold which is, or may be, impossible where the operation consists of the supply of water to a large urban community.

In the present case, once the corporation had undertaken the duty

of supplying water to the inhabitants of Croydon, it was bound to continue it, and was not in the position of a private trader, who, if conditions become difficult, can give up his business. A number of the statutory obligations imposed by the Waterworks Clauses Act are obligations which, in certain circumstances, such as a prolonged period
A of drought, or some disturbance of the gathering ground, or grave interference with the machinery and plant by which the water is collected, purified, and distributed, might render it wholly impossible for the corporation to perform its duties if those duties are construed to be absolute. The particular section in question does not indicate
B the means by which provision of a pure and wholesome supply of water is to be maintained. It directs the end to be achieved. It is not easy to extract from the authorities the principle which dictates precisely where the dividing line is to be drawn. In my judgment, the present case falls within the principle of *Hammond v. St. Pancras Vestry* (8),
C and I hold that the obligation on the corporation is not an absolute obligation, but is limited to the exercise of all reasonable care and skill to ensure that the water provided accords with the provisions of the Act. I have no doubt that the standard of care and skill required of an authority engaged on a matter so vital to public health is a high one,
D but, if that standard is maintained, I do not think that, on the true construction of the Act, the corporation can be held to be liable for the consequences of the presence in the water supplied by it at the point where it reaches the consumer of some impurity which no care or skill could have prevented. In the result, on the facts as I have found them,
E the corporation in the present case has not performed the duty imposed on it by the statute, but, inasmuch as the statutory duty does not create any right in favour of the infant plaintiff, if her cause of action were based on the breach of a statutory duty and nothing else, it follows, in my judgment, that her action would fail, if only for the reason that
F the statutory duty was not owed to her. Mr. Read was a person to whom the duty was owed, and, for reasons which will hereafter appear, was, in my judgment, entitled to pursue his remedy in damages for a breach of that statutory duty. It was pressed on me that the statutory duty, if it was a duty to exercise due care and skill, was the same as any
G common law duty that might exist, while, if it was an absolute duty, it was wider and more comprehensive than the common law duty, so that in either case the statutory remedy must be exclusive of any other remedy. Accordingly, it was argued on behalf of the corporation that, inasmuch as the statute which created the duty to exercise all reasonable
H care and skill in the provision of a supply of water provided in sect. 43 a remedy for the breach of that duty, that remedy must be an exclusive remedy which negatives the existence of any right of action for damages. If this view of the law is right, the consequences are startling. The corporation being under an obligation to persons who are householders and ratepayers to supply water sufficient for their domestic needs,

which means a supply sufficient, not merely for the ratepayers themselves, but also for their families and households, it must have been within the contemplation of everybody who gave the matter a thought that the water so supplied would be consumed by persons outside the very limited class to which the duty was owed. Miss Read has contracted a dangerous illness as a direct result of the negligence, using the word as meaning the failure of the corporation to exercise due care and skill. It would indeed be an extraordinary result if Miss Read were to be deprived of her remedy at common law because of the existence of an Act of Parliament which imposes a duty, but not a duty to her, and which sets up a remedy for breach of that duty of which she can never be in a position to take advantage.

There are a number of statutes by which duties are imposed and remedies provided for the breach in relation to which it has been held that the remedy is exclusive, while in others it has been held that there is, in addition to the statutory remedy, a right of action to recover damages resulting from the breach of the statutory duty. Here, again, the difficulty is to discover the principle which determines where the line is to be drawn. One statement of the principle appears in *Phillips v. Britannia Hygienic Laundry Co.* (9), where ATKIN, L.J., says, at pp. 840, 841 :

The question is whether they [the statutory regulations] were intended to be enforced only by the special penalty attached to them in the Act. In my opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. Was it intended to make the duty one which was owed to the party aggrieved as well as to the state, or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates. One question to be considered is, Does the Act contain reference to a remedy for breach of it? *Prima facie* if it does that is the only remedy, but that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals.

This passage, in my judgment, indicates that the dividing line is to be found in the intention of the Act of Parliament, and that one of the means of determining what that intention is is to ascertain whether the duty is a duty owed primarily to the state or community, and only incidentally to the individual, or primarily to the individual or class of individuals, and only incidentally to the state or community. Adopting that statement of principle, while there is no doubt that, for breaches of some of the statutory duties imposed by the Waterworks Clauses Act, the penalty is exclusive, it is difficult to believe that the legislature intended that it should be exclusive in the case of every breach of every duty under the Act.

I find it impossible to hold, unless compelled by authority so to do, that the legislature intended that there should be one remedy, and one remedy only, equally applicable to so trivial a breach as the failure to maintain a certain pressure of water behind a fire plug and to a deliberate dereliction of duty resulting in the destruction of a large community

by the supply of poisonous water. I must not be understood to mean that in the present case the corporation, or its officials, was guilty of a deliberate dereliction of duty. I use it as a hypothetical, but possible, case, indicating that, while the legislature intended the statutory remedy to be exclusive as to certain breaches, it cannot have intended it to be
A exclusive as to all.

Applying one of the means of ascertaining the intentions of the legislature indicated by ATKIN, L.J. (as he then was), to the Act now under consideration, while it is clear that many of the duties imposed by the Waterworks Clauses Act, 1847, such as the provision of the
B supply of water at a certain pressure for the purpose of extinguishing fire, are duties which are primarily for the benefit of the community as such, and only enure incidentally or accidentally for the benefit of a particular individual, it is difficult to think of a duty which more
C particularly concerns the individual, and each individual as such, than does the supply of domestic water. That the water should be pure and wholesome is a matter that effects each householder concerned, not incidentally or accidentally, but invariably and necessarily every day of the year, and almost each hour of every day. It was, however,
D pressed on me that the matter was concluded by the decision of the Court of Appeal in *Atkinson v. Newcastle & Gateshead Waterworks Co.* (10). In that case, which was a case decided under the Waterworks Clauses Act, 1847, the plaintiff brought an action for damages against a waterworks company for not keeping their pipes, to which fireplugs were
E fixed, charged with water at a certain pressure, whereby a fire which burned down his premises was not brought under control. It was held that the statute gave him no right of action. The case did not proceed on the basis that the damages sustained were too remote, but solely on the footing that the statutory remedy was exclusive. The cause
F of action was based solely on the breach of the statutory duty. The case was tried on demurrer. That decision established beyond controversy, so far as this court is concerned, that, in respect of the duty imposed by this particular section of the Act of Parliament (which, though contained in the same Act, is not the same section as that with
G which I have to deal), no action for damages at the suit of an individual could lie for its breach. At pp. 446, 447 appears a passage in the opinion of LORD CAIRNS, L.C., on which the corporation in the present case strongly
relied :

Apart, then, from authority, I should say, without hesitation, that it was no part
H of the scheme of this Act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action ; but that its scheme was, having laid down certain duties, to provide guarantees for the due fulfilment of them, and where convenient to give the penalties, or some of them, to the persons injured, but, where not convenient so to do, there simply to impose public penalties, not by way of compensation, but as a security to the public for the due performance of the duty.

In this conclusion COCKBURN, L.C.J., concurred. It is to be observed that at the beginning of his opinion LORD CAIRNS, L.C., pointed out that

the court could reject at once all that part of the declaration which related to the supply of water for reward, the breach alleged not being in any way dependent on the payment of money, inasmuch as the duty created by the Act did not depend in any way upon the payment of money by anybody. BRETT, L.J., prefaced his judgment with this observation, at p. 449 :

On the true construction of this statute it is plainly the intention of the legislature that the only remedy for such a breach of duty as the present should be the recovery of the penalty.

He did not say that the only remedy for the breach of any duty under the Act was the recovery of the penalty, but only for such a breach of duty as the one he was then considering. Notwithstanding the generality of some of the expressions used, more particularly in the opinion of LORD CAIRNS, L.C., that case is, in my judgment, distinguishable from the present one, inasmuch as the particular section with which the court was then concerned was a section creating a duty for the benefit of the community as such. Moreover, in *Atkinson's* case (10), in the absence of the statute, or of any contractual obligation, there could not have been any common law remedy at the suit of a person whose shop was burnt down because the pressure of water in a particular pipe was insufficient to enable the fire engines to put out the fire. That case, therefore, even if it decided, as, in my judgment, it did not, that there could be no remedy by action open to any person to whom the duty was owed for breach of any duty imposed by the Act, and not merely for the particular breach of duty which the court was then considering, leaves the question of common law liability untouched. The fallacy underlying this part of the argument put forward on behalf of the corporation arises, in my judgment, from the proposition that, because the statutory duty was identical with, or wider than, the common law duty, it was either necessarily the same as, or extinguished, the common law duty. The scope of the two duties may have been identical, or the scope of the statutory duty may have been wider than that of the common law duty, but the class of persons to whom they were respectively owed was different, and their origin was different. The fact that a statute imposes a duty does not absolve the person on whom the duty is cast from his obligation in the performance of the duty to observe the common law rights of third persons, unless the statute expressly so provides : *Glossop v. Heston & Isleworth Local Board* (11), per JAMES, L.J., at pp. 110, 111, and the cases there cited. This distinction between *Atkinson's* case (10) and the present case, so far as the question of common law liability is concerned, is, in my judgment, fundamental and decisive.

In the present case, it would be possible to set out in the form of a declaration or statement of claim a complete cause of action at the suit of the infant plaintiff without making any mention of the statute. Wholly apart from the statute, and irrespective of whether or not it imposed any duties, or of the scope of the duties, or of the class of

persons to whom the duties were owed, if the corporation supplied water for drinking purposes to Mr. Read's house which they knew would be consumed by him and the members of his household and failed to exercise the requisite degree of care or skill in the course of that operation, with the result that what they supplied was not drinking water but
A poison, the person injured would, in my judgment, have a complete cause of action at common law for the damage sustained as a result of that negligence. This view is, I think, supported by *M'Alister (or Donoghue) v. Stevenson* (12). In my judgment, this is an *a fortiori* case, and might have been decided in favour of the infant plaintiff even if
B the decision of the House of Lords in *Donoghue's* case (12) had been the other way.

Sir Walter Monckton, in support of this part of his argument, strongly relied on certain passages from the opinion of LORD DUNEDIN in *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.* (13),
C where he says, at pp. 663-665 :

I wish, however, to state explicitly my opinion that the whole question necessarily depends upon the proper construction of the statute; and that where the statute deals with the subject its provisions form a code on that subject, and cannot be added to by what has been called a common law doctrine. . . . in the case of a public right, when the statute which authorises goes on to provide what are to be the
D rights and obligations flowing from the execution of the statutory Act, it is in it and in it alone that rights and remedies must be found.

In that case, under an Act passed in 1791, a canal company were empowered to make a canal, and were obliged to construct certain bridges of the dimensions and structure to be approved by the commissioners
E appointed under the Act, and thereafter to support, maintain, and keep in sufficient repair the bridges so constructed. The bridges were completed in, or shortly before, the year 1812. The action was an action by the Attorney-General at the relation of the Worcester Corporation asking for a declaration that the canal company were under an obligation
F to keep the bridges in repair, so as to be sufficient to carry the traffic which from time to time might reasonably be expected to pass along the highways, having regard to the change in the character and needs of the district. The action failed, and it is in relation to these facts that LORD DUNEDIN's words must be read. In that case, it is clear that the
G statutory obligation to repair bridges as they existed in 1812 was the only obligation imposed on a canal company, and that no common law obligation could be imported or invented so as to impose on the canal company a sort of shifting obligation to maintain the bridges in a state which might vary from year to year, according to the changes which
H mechanical invention, or the volume and nature of the traffic might bring about.

In the present case, there is, in my judgment, wholly independent of the statute, a common law obligation brought into operation by what was in fact done by the corporation. It is the facts, and the facts alone, which give rise to this cause of action, which would have been present

if the Act of Parliament had not existed. The view I have formed is supported, though on different ground, by *Simpson v. South Oxfordshire Water & Gas Co.* (14), where it was held by a Divisional Court on a case stated by the justices of Oxfordshire that sect. 43, the penalty section of the Waterworks Clauses Act, applied only to a total cessation of the supply, and not to a neglect consisting of the failure to furnish A a supply adequate either in quantity or in purity.

I ought not to leave this branch of the case without making some reference to the Public Health Act, 1936, ss. 111, 115, which it was suggested imposed some additional statutory duty on the corporation. In my judgment, the failure of the corporation, which is the source of B its liability as being the cause of Miss Read's illness, was not a failure to perform the duties imposed by sect. 111. Sect. 115, even if it is applicable, does not, in my judgment, impose a duty stricter than, or different from, that created by the section of the Waterworks Clauses Act, although the class of persons to whom the duty is owed may be C wider. If it be necessary to decide the point, I hold that the Public Health Act, 1936, s. 115, which provides that a local authority which supplies water under that Act shall do certain things, has no application to the present case, inasmuch as the water now under consideration was not supplied in discharge of duties imposed, or in the exercise of powers D conferred, by the Public Health Act or its predecessor, but by the Croydon private Act, which incorporates the Waterworks Clauses Act.

The only other matter which falls to be considered is the question of damages. Mr. Read sues in his own right to recover the special damages he sustained as a result of his daughter's illness. On behalf E of the corporation, it was stated that, on the assumption that there was a right of action, it was not contended that, because Mr. Read was not the person who had suffered from typhoid, while Miss Read was not the person who had incurred the expense, neither Mr. Read nor his daughter was unable to recover what had been expended in doctor's F fees, or the like. In the view I have formed, each plaintiff has a separate and independent cause of action—Mr. Read for the breach of the statutory duty that was owed to him, Miss Read for the breach of the common law duty that was owed to her. It remains unnecessary, therefore, to consider precisely the basis on which a parent recovers his out-of-pocket G expenses incurred as a result of the injuries sustained by a member of his household arising from the negligent act of some third person.

The items and the amounts of special damage have been agreed between the parties, with the exception of one item consisting of a claim for £63 11s., described as hotel accommodation for the adult plaintiff H and his family during the infant plaintiff's illness. This item came into existence in the following way. When Mr. Read found that his daughter was infected with typhoid, two nurses were brought into the house, and Miss Read was nursed by them at her father's home, with the assistance of her mother and a domestic servant. Mr. Read and his elder daughter,

a young woman aged about 19 years, retired to the Langham Hotel. Mr. Read was somewhat uncertain as to the motives which prompted him to adopt this course. In fact, he gave me a selection of motives or reasons, and rather left me, I think, to select the one which appealed to me most. He said that he took this step because, in the first place, A he understood that typhoid was very largely communicated through drinking water or through food. He was also anxious that his daughter should have the best attention, and, with two nurses in the house, and with the domestic servant temporarily indisposed, he decided that, if he and his daughter moved out of the house, they would be giving less B trouble to the domestic staff than if they remained where they were. He further added that he was the secretary of a big organisation, and was in daily contact with the workers there, who would have been afraid of infection. Mr. Read's house contained about 13 or 14 rooms, including C bathrooms. The medical evidence upon the point was unanimous. Dr. Eyre, who was called by the plaintiffs, expressed the view that there was nothing either improper or dangerous in nursing a case of typhoid at home, and he said that, if a person went into a room to visit a patient who was suffering from typhoid, there was practically no risk of the visitor catching the infection. He added that a person D living in the same house as a person known to be a typhoid patient would incur no risk of catching the illness if ordinary reasonable precautions were taken. Dr. Conybeare, who was also called by the plaintiffs, was of substantially the same opinion, and he was able to say that a child coming from a home where there is a case of typhoid E is not prevented from attending a public elementary school. He said that, in his view, there was no impropriety in allowing children who had been in contact with typhoid cases to meet and mix with other children and to pursue their normal school life together, and he added that this was even more true in the case of intelligent adults. Dr. F Buchan confirmed these eminent opinions, and stated that in his view there was no risk. In my judgment, the plaintiffs have wholly failed to substantiate this head of damage. I do not think that it was necessary for Mr. Read and his elder daughter to go to the Langham Hotel, regarded either from their point of view or from the point of view of G the little girl who was ill in the house. If some pressure had been put on the domestic organisation, it might have been that Mr. Read and his daughter could have relieved that pressure by giving some small measure of assistance themselves. Given reasonable precautions, the danger of infection was non-existent. The reluctance of Mr. Read's H workmen to come into contact with him because of the presence of typhoid in his household was not removed by his departure to the Langham Hotel. No doubt it was more comfortable at the Langham Hotel, but for this additional comfort, in my judgment, the corporation cannot be liable to pay.

The only other question is the amount of general damage to be awarded

to Miss Read. I have considered the medical report. There is no doubt that she was seriously ill, but, happily, she appears to have made a complete and satisfactory recovery, and I think the sum of £100 is adequate to compensate her for the pain and suffering and general inconvenience thus caused. There will be judgment, then, for £100, and the agreed special damage.

Judgment for the infant plaintiff for £100, and for the adult plaintiff in respect of special damage incurred by him, excluding certain expenses not reasonably incurred, with costs.

Solicitors: *E. Royallton Kisch* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *E. Taberner*, Town Clerk, Croydon (for the defendants).

[Reported by F. HONIG, ESQ., Barrister-at-Law.]

Re DISRAELI AGREEMENT, CLEASBY v. PARK ESTATES (HUGHENDEN), LTD.

[CHANCERY DIVISION (Crossman, J.), **Novembe**

Applied. COATES v. DIMENT. [1951] 1 All E.R. 890.

Agriculture—Lease—Provision for resumption of possession of part of holding—Notice—Depriving tenant of right to compensation—Validity—Agricultural Holdings Act, 1923 (c. 9), ss. 12, 13, 27, 50, 57.

A tenancy agreement in respect of a farm provided for its determination upon two years' notice ending with a year of the tenancy, and also for the resumption of possession by the lessor "in case required for building or otherwise" of any portion of the demised premises without payment of compensation, but with proportionate reduction in rent:—

HELD: (i) upon the proper construction of the clause for resumption of possession, the lessor could resume possession without notice to the lessee.

(ii) such resumption of possession would, by preventing the lessee giving the required notice, deprive the lessee of his right to compensation under the Agricultural Holdings Act, 1923, and was, therefore, void under sect. 50 of the Act.

(iii) possession of part of the holding could, therefore, only be resumed upon giving two years' previous notice.

[EDITORIAL NOTE.] Agricultural leases often make provision for resumption of part of the holding if it is required for some special purpose. The effect of the present case is that such clauses must be drafted so as not to deprive the lessee of his right to compensation under the Agricultural Holdings Act, 1923. The terms of the lease herein, providing for immediate recovery of possession by the lessor, prevented the lessee from giving the notice as to compensation which must, under sect. 12 (7) (b) of the Act, be given one month before the determination of the tenancy.

AS TO RESUMPTION OF POSSESSION OF PART OF A HOLDING, see HALSBURY, Hailsham Edn., Vol. 1, pp. 330, 331, para. 526; and FOR CASES, see DIGEST, Supp., Agriculture, Nos. 29a-30g, and Nos. 266h-266i.]

Cases referred to:

- (1) *Johnson v. Edgware, etc., Ry. Co.* (1866), 35 Beav. 480; 31 Digest 535, 6809; 35 L.J.Ch. 322; 14 L.T. 45.
- (2) *Swinburne v. Andrews*, [1923] 2 K.B. 483; Digest Supp.; 92 L.J.K.B. 889; 129 L.T. 650.

(3) *Re Arden and Rutter*, [1923] 2 K.B. 865 ; Digest Supp. ; 130 L.T. 51 ; *sub nom. Arden v. Rutter*, 92 L.J.K.B. 894.

A ORIGINATING SUMMONS to determine whether a subclause in a tenancy agreement upon its true construction entitled the lessor to resume possession of part of the demised property without notice, and whether, if that were so, the subclause was void under the Agricultural Holdings Act, 1923. The facts are fully stated in the judgment.

J. B. Richardson for the plaintiff.

Russell Gilbert for the defendants.

B CROSSMAN, J. : In Oct., 1936, an agreement in writing expressed to be made between Coningsby Ralph Disraeli of the one part and the plaintiff in this summons, William Edward Bracebridge Cleasby, of the other part, which was an agreement for a letting by C. R. Disraeli and a taking by the plaintiff of the Manor Farm in the parish of Hughenden
C in the county of Buckingham, was signed by the plaintiff but was never signed by Mr. Disraeli or his successors in title. The agreement provided for a letting for a term of two years from Sept. 29, 1936, and, unless two years' notice to quit should be given by one of the parties to the other, expiring at the end of those two years, then that the tenancy should
D continue until two years' notice to quit should be given by one of the parties to the other, expiring on Sept. 29 in any year. Clause 4 (3) of the agreement provided as follows :

E That the landlord shall be entitled to resume possession in case required for building or otherwise of any portion of the demised premises without payment of compensation to the tenant but with proportionate reduction in the rent of £208 hereby reserved as attributable to the area of the portion of which possession shall be so resumed.

That is a subclause in a clause which begins with these words :

F Provided always and it is hereby agreed and declared by and between the parties hereto as follows . . .

Thus it is a subclause of a proviso in the agreement.

G The plaintiff entered into possession of Manor Farm on Sept. 29, 1936, and has since remained in possession thereof on the terms of this agreement. On Feb. 16, 1938, the reversion in fee simple expectant on the plaintiff's tenancy in about 40 acres forming part of Manor Farm became vested in the defendants, Park Estates (Hughenden), Ltd., and on Feb. 17, 1938, the defendants gave the plaintiff notice of this, and of the fact that £15, part of the rent payable by the plaintiff, was apportioned to the portion of about 40 acres. On Feb. 21, 1938, the
H solicitors to the defendants sent to the plaintiff a notice in the following terms :

As solicitors and agents for your landlord Park Estates (Hughenden), Ltd., we hereby give you notice in accordance with cl. 4 (3) of your tenancy agreement dated in 1936 that your said landlord forthwith resumes possession of the portion of Manor Farm Hughenden in the borough of Chepping Wycombe in the county of Buckingham which has recently been purchased by your said landlord and which forms

part of the land numbered 37 on the plan annexed to your said tenancy agreement. Dated Feb. 21, 1938.

This was signed by the solicitors.

On Mar. 8, 1938, the defendants, by one of their directors, entered upon the 40 acres. The plaintiff contended that the defendants were not entitled to resume possession of the 40 acres without giving two years' notice to quit on Sept. 29 in any year. On June 17, 1938, an agreement in writing was signed by this duly authorised agent of the defendants and by the plaintiff recording that the parties held on the terms of the agreement of 1936. On June 23, 1938, the plaintiff issued the present originating summons, which is entitled "In the matter of an agreement of 1936," and "In the matter of an agreement dated June 17, 1938," and "In the matter of the Agricultural Holdings Act, 1923," asking for the determination of the following questions:

(1) Whether or not on the true construction of the said tenancy agreement and having regard to the provisions of the Agricultural Holdings Act, 1923, the defendants are entitled under cl. 4 (3) of the said tenancy agreement or otherwise to determine the tenancy as to any part of the premises comprised therein otherwise than by giving two years' notice in writing expiring on Sept. 29 in any year to quit such part or how otherwise and for a declaration accordingly. (2) Whether in the events which have happened the defendants are entitled to immediate possession of the premises comprised in a notice dated Feb. 21, 1938, and given by Messrs. Bliss & Sons as solicitors and agents for the defendants to the plaintiff. (3) Directions as to the costs of this application.

Mr. Richardson, on behalf of the plaintiff, has put forward three contentions. First of all, he contends that, on the true construction of cl. 4 (3) of the tenancy agreement, as the clause does not specify any period of notice on which, or any time at which, possession can be resumed, the notice specified in cl. 1 of the tenancy agreement is by implication necessary, and possession can only be resumed upon two years' notice expiring on a Sept. 29. Alternatively, Mr. Richardson contends that a reasonable notice is necessary, and that reasonable notice is required by the Agricultural Holdings Act, 1923, s. 25—namely, 12 months from the end of the current year of the tenancy. Finally, Mr. Richardson contends that, if, on the true construction of cl. 4 (3) of the tenancy agreement, no notice is required before possession can be resumed, the clause is void under the Agricultural Holdings Act, 1923, s. 50, because, as he contends, the plaintiff's right to compensation under the Act is taken away or limited by virtue of the clause. Upon the question of construction of cl. 4 (3) of the tenancy agreement, I cannot accept either of Mr. Richardson's contentions. In my judgment, the clause means that, if the landlord requires any part of the premises for building, or for any purpose *ejusdem generis* with building—as to the words "or otherwise" I would refer to *Johnson v. Edgware, etc., Ry. Co.* (1)—he can determine the tenancy as to such part without giving any notice to the tenant and without paying any compensation to the tenant. It seems to me that the words "without payment of compensation" in this clause are clearly affected by sect. 50 of the Act of 1923, and it may be that the effect of those words is sufficient by itself

to render the whole clause void. However, the question which arises is whether or not any compensation is payable under the Act in the present case, or whether or not there would be, apart from this clause. Is there anything which sect. 50 can affect? Sect. 50 of the Act provides as follows :

A Subject to the provisions of this Act, any contract (whether under seal or not) made by a tenant of a holding, by virtue of which his right to claim compensation under this Act is taken away or limited, shall to that extent be void.

The compensation which was dealt with in the first part of the argument in this case was mainly the compensation for disturbance which arises under sect. 12 of the Act of 1923. The first question upon which I have to make up my mind is whether or not any compensation for disturbance is payable under sect. 12 of the Act of 1923 when no notice is required. I am considering this question now on the basis of my finding, on the construction of the clause, that the clause means that no notice is required before possession can be resumed. Can it be said that the tenancy terminates by reason of a notice to quit given by the landlord? Unless it can be so said, sect. 12 does not seem to give any right to compensation at all. "Compensation for disturbance" is the heading of a number of sections beginning at sect. 12, which provides as follows :

(1) Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, unless . . . compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section. . .

E It seems to me that, if my construction of cl. 4 (3) of the tenancy agreement is right, no notice to quit is necessary to terminate the tenancy, and under the subclause the tenancy may be determined simply by the landlord entering without any previous notice. However, sect. 27 (2) of the Act provides as follows :

F Where the landlord of a holding gives notice, in pursuance of a provision in that behalf contained in the contract of tenancy, of his intention to resume possession of some part of the holding, the provisions of paras. (b) and (c) of subsect. (1) of this section (but not including the proviso thereto) shall apply as if the notice were such a notice to quit as is mentioned in that subsection.

G Subsection (1) (b) is the one with which I am concerned and provides as follows :

(b) the provisions of this Act respecting compensation shall apply as if the part to which the notice relates were a separate holding.

H Does the fact that no notice is required under cl. 4 (3) prevent the case from coming with sect. 27 (2)? In fact, here the landlord did give a notice, and I think that that is sufficient for the purpose. Subsect. (2) does not say "Where the landlord is required to give notice," but "Where the landlord gives notice." It is true that it continues "in pursuance of a provision in that behalf contained in the contract of tenancy," and that it refers also to "his intention to resume possession of some part of the holding." What he did was to give notice of his

intention, in pursuance of the provisions of the contract of tenancy, to resume possession. I do not find that the giving of notice is necessary, but, where the landlord has given notice, I think that that brings sect. 27 (1) (b) into force, and the provisions of this Act respecting compensation apply "as if the part to which the notice relates were a separate holding." The result of that is that the position is the same, A really, as if sect. 12 had applied. All the compensation is payable under this Act. With regard to sect. 12 (7), Mr. Richardson argues that sect. 12 provides for the payment by the landlord to the tenant of compensation for disturbance, and that subsect. (7) enacts that "compensation shall not be payable under this section," and then, referring to B subsect. (7) (b) :

... unless the tenant has, not less than one month before the termination of the tenancy, given notice in writing to the landlord of his intention to make a claim for compensation under this section..

Then sect. 50 of the Act, to which I have already referred, says : C

Subject to the provisions of this Act, any contract (whether under seal or not) made by a tenant of a holding, by virtue of which his right to claim compensation under this Act is taken away or limited, shall to that extent be void.

If, as I have found on the construction, no notice is required before possession can be resumed under cl. 4 (3) of the tenancy agreement, the D tenant cannot, in compliance with sect. 12 (7) (b), give notice in writing to the landlord of his intention to make a claim for compensation under the section not less than one month before the termination of the tenancy, and so he is deprived of his right to compensation. However, Mr. Richardson's argument is that cl. 4 (3) of the tenancy agreement E takes away or limits the tenant's right to compensation under the Act, and is consequently void under sect. 50 of the Act.

Mr. Russell Gilbert, for the defendants, says, in answer to this argument, that, by virtue of the definition of "termination" in sect. 57 of the Act, the expression "termination of the tenancy" in sect. 12 (7) (b) F means the cesser of the contract of tenancy, and, relying upon two cases—*Swinburne v. Andrews* (2) and *Re Arden & Rutter* (3)—he contends that the contract of tenancy in the present case does not cease until all the land comprised in the tenancy agreement has ceased to be subject to it, and the tenant is not deprived of his right to compensation unless he G fails to give notice of his intention to make a claim at least a month before the final termination of the tenancy, which may be many years hence.

In reply to Mr. Gilbert's argument, Mr. Richardson relies on sect. 27 (2) of the Act, to which I have already referred, where these words occur in H the subsection, which, as I have said, make the provisions for compensation applicable :

(b) the provisions of this Act respecting compensation shall apply as if the part to which the notice relates were a separate holding...

Mr. Gilbert says that sect. 27 (1) (b) means that the part to which the

notice relates is to be treated as a separate holding only for the purpose of assessing compensation. I do not find that in the Act. It seems to me that the provisions of this Act respecting compensation generally are to apply as if the part to which the notice relates were a separate holding. If that is the case, the termination of the tenancy of these
 A 40 acres with which we are concerned now takes place, the landlord re-enters under the power, and you are not entitled to postpone the claim for compensation until the termination of the tenancy of the whole matter. In my judgment, as cl. 4 (3) of the tenancy agreement, if valid, would enable the landlord to determine the tenancy as to part of the
 B demised premises by re-entering without any previous notice, a determination as to part under the clause would affect the determination of the tenancy as to such part within the meaning of sect. 12 (7) (b) of the Act, and the tenant would be deprived of his right to compensation by that subsection. The clause is, so far as it purports to enable
 C the landlord to determine the tenancy as to part without any previous notice, rendered invalid by sect. 50. It seems to me that that renders the whole clause useless for the present purpose, because the landlord cannot make any use of it without giving the full notice required by cl. 1 of the tenancy agreement. In my judgment, therefore, the landlord
 D is not entitled to determine the tenancy under cl. 4 (3) of the tenancy agreement as to part of the demised premises without giving the notice required by cl. 1 of the tenancy agreement.

Solicitors: *Rutland & Crauford*, agents for *Winter-Taylor & Woodward*, High Wycombe (for the plaintiff); *Savory, Pryor & Blagden*, agents for *Bliss, Sons & Covell*, High Wycombe (for the defendants).
 E

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

F

NOTE.

COTTINGHAM'S EXECUTORS v. INLAND REVENUE COMMISSIONERS.

G [COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **November 30, 1938.**]

APPEAL from a decision of LAWRENCE, J., reported [1938] 3 All E.R. 560.

H The Court of Appeal dismissed, with costs, an appeal in this case from the order made by LAWRENCE, J., dated July 5, 1938. SIR WILFRID GREENE, M.R., stated that he desired to adopt the judgment of LAWRENCE, J., as it so completely covered the ground that it was unnecessary to say more. FINLAY and LUXMOORE, L.JJ., agreed. Counsel for the Crown were not called upon to argue.

ATTORNEY-GENERAL (AT THE RELATION OF ROCHDALE CORPORATION) *v.* ROCHDALE CANAL CO.[CHANCERY DIVISION (Bennett, J.), **November 23, 24, 1938.**]

Railways and Canals—Canals—Powers—Supply of water to railway company—Statute restricting supply to mills and works on adjoining land—Rochdale Canal Act, 1899 (c. clviii), s. 37.

A canal company supplied a railway company at two points with water for the purpose of raising steam in the latter company's locomotive engines. The centrifugal pumps, suction-pipe and storage-tanks for the supply of the water were installed by, and were the property of, the railway company. Under the Rochdale Canal Act, 1899, s. 37, the supply of water by the canal company was permitted, *inter alia*, for the purpose of condensing or raising steam for mills or works within 100 yds. of the canal:—

HELD: (i) railway lines, troughs and signal-wires were not "works" within the meaning of the Act so as to enable water to be supplied to them for the purpose of enabling steam to be raised or condensed in respect thereof.

(ii) the pumps, pipes, water-tanks and water-troughs were not "works" within the Act, nor was water supplied to them for the purpose of raising steam in or for them, and the supply to the railway company was, therefore, *ultra vires*.

[EDITORIAL NOTE. The question here is purely one of construction, but the decision is of importance, owing to the fact that it is necessary for a railway company to secure an ample supply of water at many points along its line, and in many cases this decision will debar such companies from availing themselves of a very convenient source of supply.

AS TO POWERS OF CANAL COMPANIES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 334, 335, para. 749; and FOR CASES, see DIGEST, Vol. 38, pp. 401, 402, Nos. 939-941.]

ACTION for a declaration that the supply of water by the Rochdale Canal Co. to the London, Midland and Scottish Railway Co. was *ultra vires*, and for an injunction to restrain the canal company from continuing to supply water to the railway company.

Cyril Radcliffe, K.C., and Maurice Fitzgerald, K.C., for the plaintiffs.
F. R. Evershed, K.C., and Roger W. Turnbull for the defendants.

BENNETT, J.: The question in this case turns upon the true construction of the Rochdale Canal Act, 1899, s. 37. The Rochdale Canal Co. was incorporated in 1794 by the Act 34 Geo. III, c. 78. Sect. 1 incorporates the company, and empowers the company to make, construct and maintain the Rochdale Canal, with all the necessary works and appurtenances. Under that Act and two later Acts, 39 and 40 Geo. III, c. 36, and 46 Geo. III, c. 20, the waste water of the canal company has to pass into the canal. There is an exception to be found in sect. 113 of the 1794 Act, which enables owners of lands within 20 yds. of the canal to lay pipes connecting with the canal and to take water from the canal for the purpose of condensing steam used for working steam-engines on their lands. With that exception, all the waste water from the canal from the time of the incorporation of the company down to

1899 had to be passed into the canal, which in 1794 belonged to the then Duke of Bridgewater.

In 1899, there was passed the Act which contains the section which now has to be construed, sect. 37, which, so far as is material, reads as follows :

A Notwithstanding anything in the former Acts of the company it shall be lawful for the company to sell and supply water from the Rochdale Canal or the cuts thereof for manufacturing trade or other purposes (not being domestic) to any person firm or company requiring such supply on such terms and conditions as may be agreed on between the company and the person firm or company taking such supply. Provided that nothing in this section shall authorise the company to supply any water if and so long as the giving of such supply may prevent the company from affording a full and efficient supply of water for the purposes of their canal or to supply water (other than water for condensing or raising steam to mills or works within 100 yds. of the canal) within the statutory limits of supply of any corporation or public body for the time being owning or controlling a water undertaking or authorised by or under Act of Parliament passed or to be passed to construct water-works without the consent of such corporation or body . . .

C The facts which give rise to the question have been agreed between the parties. The relators are a corporation owning a water undertaking, and the supplies of water given by the defendants to the London, Midland and Scottish Ry. Co. are given and taken at points within the statutory limits of the supply of water of the relators. The supply is given in the following manner. At or near Clegg Hall, where the canal and the permanent way of the London, Midland and Scottish Railway Co. run in parallel lines at a distance of a few feet the one from the other, the supply is given for the purpose of raising steam in the railway company's locomotive engines. The water is drawn from the canal by a centrifugal pump through a 6-inch suction pipe about 15 ft. long laid under the tow-path on the north-westerly side of the canal and driven forward by the pump through a measuring meter into a storage-tank of 70,000 gallons capacity on the south-easterly side of the railway. From the storage-tank, the water flows by gravity to pick-up troughs situated immediately below such tank between the rails of the up lines and the down lines, respectively, and to two water-columns. The pump, suction-pipe and storage-tanks were erected or installed by, and are the property of, the London, Midland and Scottish Railway Co. The supply near Nigher Moss, at the point where Bridge 69 of the railway company passes over the canal of the defendants, is given in the following way.

G The water is drawn from the canal by a centrifugal pump through a 6-inch suction-pipe about 14 ft. long laid under the tow-path on the north-westerly side of the canal, and is driven forward by the pump through a measuring meter into a storage-tank of 20,000 gallons capacity. From the storage-tank the water flows by gravity to the several water-columns situate at or near Rochdale Station. The pump, suction-pipe and storage-tanks were erected or installed by, and are the property of, the London, Midland and Scottish Railway Co.

The question is whether that supply is a supply which is permitted by the Rochdale Canal Act, 1899, s. 37. It depends upon whether or not the supply is for the purpose of condensing or raising steam to mills

or works within 100 yds. of the canal. The supply is for the purpose of raising steam in the locomotive engines of the London, Midland and Scottish Railway Co. The question, in my judgment, turns upon whether or not it can be said that the defendants are supplying water for the defined purposes to works within a distance of 100 yds. from the canal.

The argument on behalf of the defendants was put in two ways. A First, it was said that within 100 yds. of the canal there are some railway lines, some troughs, and some signal-wires. Those things are a part of the works of the London, Midland and Scottish Railway Co., and, so long as there are works a part of which are within 100 yds. of the canal, water can be supplied to those works if the purpose is to enable steam B to be raised or condensed in respect of those works. The second argument, put forward by Mr. Turnbull, was that here, on the facts, there are two sets of waterworks, one at Nigher Moss and the other near Clegg Hall—waterworks consisting of a pump, pipe, meter, storage-tank, tanks connecting the storage-tank with the water-troughs, and the supply- C columns. To those waterworks the canal company are supplying water for the purpose of condensing or raising—in this case, raising—steam. I think that it is sufficient for me to say, so far as the first argument is concerned, that the word “works” has never been used as a word apt to describe the permanent way of any railway company, and, therefore, D the lines, troughs, signal-wires, and matters of that kind within 100 yds. of the canal are not, in my judgment, works within the meaning of sect. 37. So far as Mr. Turnbull’s argument is concerned, it is far-fetched, I think, to say that this collection of units—pump, pipes, troughs, and water- E columns—is a waterworks. Nor is the water (supposing those to be waterworks) supplied for the purpose of raising steam in them or for them. It is supplied for a wholly different purpose. For those reasons, in my judgment, the plaintiffs have established that the supply which the defendants are giving to the London, Midland and Scottish Railway Co. is not authorised by sect. 37 of the 1899 Act, and is *ultra vires*. They F are entitled, in my judgment, to the declaration for which they ask, with liberty to apply for an injunction.

Declaration granted, with costs. Liberty to apply for an injunction.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Harry Bann*, Town Clerk, Rochdale (for the plaintiffs); *Winter & Co.*, agents for *H. A. G. G Kilner*, Rochdale (for the defendants).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

KNIGHT v. HOWARD WALL, LTD.

[COURT OF APPEAL (Slessor, Finlay and Luxmoore, L.J.J.), December 6, 1938.]

A *Workmen's Compensation—Canteen on same premises as factory—Workmen permitted, but not compelled, to use canteen—Workman injured by dart while in canteen—Whether accident arising out of and in the course of his employment.*

The applicant was injured by a dart while he was eating his midday meal in a canteen. The canteen was a part of the employers' premises, and was provided for the convenience of the workpeople by arrangement with an independent contractor. The men were allowed to use this canteen, but were under no obligation to do so:—

B **HELD:** the accident arose out of and in course of the applicant's employment.

[EDITORIAL NOTE. In this case the workman was by permission upon the employer's premises during a meal-time. He was there in circumstances which made him either an invitee or a licensee, and it is held, upon a review of all the authorities, that, in such circumstances, the taking of a meal upon the employer's premises is not an interruption of the employment, but is in the course of the employment.

C **AS TO ACCIDENT IN MEAL-TIME,** see HALSBURY, 1st Edn., Master and Servant, Vol. 20, p. 172, para. 362; and FOR CASES, see DIGEST, Vol. 34, p. 284, Nos. 2381-2384. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 34, 35.]

D Cases referred to :

- (1) *Blovel v. Sawyer*, [1904] 1 K.B. 271; 34 Digest 284, 2381; 73 L.J.K.B. 155; 89 L.T. 658; 6 W.C.C. 16.
- (2) *Brice v. Edward Lloyd, Ltd.*, [1909] 2 K.B. 804; 34 Digest 304, 2514; 79 L.J.K.B. 37; 101 L.T. 472; 2 B.W.C.C. 26.
- (3) *Armstrong, Whitworth & Co. v. Redford*, [1920] A.C. 757; 34 Digest 314, 2579; 89 L.J.K.B. 495; 123 L.T. 114; 13 B.W.C.C. 68; *affg.*, 88 L.J.K.B. 850.
- (4) *Davidson (Charles R.) & Co. v. M'Robb or Officer*, [1918] A.C. 304; 34 Digest 276, 2339; 87 L.J.P.C. 58; 118 L.T. 451; 10 B.W.C.C. 673; *revsq.* (1917), 10 B.W.C.C. 480.
- (5) *Lawrence v. George Matthews (1924), Ltd.*, [1929] 1 K.B. 1; Digest Supp.; 97 L.J.K.B. 758; 140 L.T. 25; 21 B.W.C.C. 345.
- (6) *Smidmore v. London & Thames Haven Oil Wharves, Ltd.* (1921), 14 B.W.C.C. 114; 34 Digest 286, 2404.
- (7) *Trim Joint District School Board of Management v. Kelly*, [1914] A.C. 667; 34 Digest 270, 2300; 83 L.J.P.C. 220; 111 L.T. 305; 7 B.W.C.C. 274; *affg.*, 6 B.W.C.C. 921.
- (8) *London & North Eastern Ry. Co. v. Brentnall*, [1933] A.C. 489; Digest Supp.; 102 L.J.K.B. 438; 148 L.T. 530; 26 B.W.C.C. 225.
- (9) *St. Helens Colliery Co., Ltd. v. Hewitson*, [1924] A.C. 59; 34 Digest 280, 2364; 93 L.J.K.B. 177; 130 L.T. 291; 16 B.W.C.C. 230.
- (10) *Lancashire & Yorkshire Ry. Co. v. Highley*, [1917] A.C. 352; 34 Digest 290, 2425; 86 L.J.K.B. 715; 116 L.T. 767; 10 B.W.C.C. 241; *revsq.* (1916), 85 L.J.K.B. 1513.
- (11) *Armitage v. Lancashire & Yorkshire Ry. Co.*, [1902] 2 K.B. 178; 34 Digest 297, 2465; 71 L.J.K.B. 778; 86 L.T. 883; 4 W.C.C. 5.
- (12) *Thom (or Simpson) v. Sinclair*, [1917] A.C. 127; 34 Digest 320, 2619; 86 L.J.P.C. 102; 116 L.T. 609; 10 B.W.C.C. 220.

APPEAL from an award of His Honour JUDGE TUDOR REES, given at Shoreditch County Court, dated Oct. 4, 1938. The facts are fully set out in the judgment of SLESSER, L.J.-

E. Martin Jukes for the appellants.

J. H. C. Goldie for the respondent.

Jukes : This case is not within the principle of *Armstrong, Whitworth & Co. v. Redford* (3). The judge thought that he was bound by *Smidmore v. London & Thames Haven Oil Wharves, Ltd.* (6), but that case is irrelevant. If a man may, but need not, subject himself to a danger, then, if he does so and is injured, he cannot recover. If a man is injured through the tortious act of another employee, that is not a risk arising out of his employment ; *Trim Joint District School Board of Management v. Kelly* (7). A dangerous place is one that is dangerous as a place. There is no finding here that darts is a dangerous game. This was a risk to which everyone else was equally exposed. [Counsel also referred to *Davidson (Charles R.) & Co. v. M'Robb or Officer* (4), *London & North Eastern Ry. Co. v. Brentnall* (8), *St. Helens Colliery Co., Ltd. v. Hewitson* (9), *Lancashire & Yorkshire Ry. Co. v. Highley* (10), *Armitage v. Lancashire & Yorkshire Ry. Co.* (11), *Thom (or Simpson) v. Sinclair* (12) and *Lawrence v. Matthews (George) (1924), Ltd.* (5).]

Goldie was not called on.

SLESSER, L.J. : This case has been extremely well argued, and we are very much indebted to Mr. Jukes, who, I think, has put before us every possible contention on behalf of the appellants. Nevertheless, I have come to the conclusion that, on the judge's findings of fact, he was right in holding that the workman had proved as a matter of law that this accident arose out of and in the course of his employment.

The workman is a boy of 15 years of age. At lunch-time, there is a break in his employment from 1 p.m. to 2 p.m., during which time the factory is locked up. On the top floor of the factory, however, there is provided a canteen where he and other workmen can take food and eat it, or buy a hot meal. They are not bound to buy anything. In the canteen, there were numerous tables on which games could be played—table tennis and draughts—and a dartboard. The evidence of the director of the employers is that this canteen is owned by the employers, but that it is run by an outside person, as he is called, who pays for the gas which is there used, and keeps discipline, if there be any to be kept. Any profits on the catering rights go to this man, Mr. Lorkin, and, if there were losses, Mr. Lorkin would be expected to bear them.

The judge has found that the canteen formed part of the premises of the respondents upon which the applicant was employed, and that the canteen was provided by the respondents for the convenience of their workpeople by arrangement with an independent contractor, but not for the respondents' profit. On the day when the applicant met with his accident—namely, Mar. 16, 1938—he went, as he usually did, to

this canteen, and had lunch. He was sitting at a table eating his lunch, and there was a dartboard some 5 ft. away from him. A boy got up to play darts, and the dart flew off the dartboard and hit the applicant's eye. He was seriously injured in the eye, and compensation was claimed and has been awarded by the judge, who awarded him 13s. 2d. per week from Mar. 16, the date of the accident, to the date of the hearing. The applicant was also granted a declaration of liability.

There is really no dispute on the facts of the present case. The appeal raises two questions, (i) whether or not, on the finding of those facts, it could properly be said that the accident which undoubtedly happened arose in the course of the employment, and (ii) whether or not it arose out of the employment. With regard to the first matter, I am of the opinion that the judge was right, on his finding of fact that this was a canteen in the same premises as the factory to which the workmen were invited to go to have their lunch, in holding that that right was exercised by the workman as one of the terms of the employment. Although he was under no duty to go there, yet he was in substance invited to go there, there being a canteen provided, as the very word implies, for the purpose of providing social and recreative amenities for the workmen.

There have been decided a number of cases on this matter. The first to which I need refer is the case in this court of *Blovelt v. Sawyer* (1). In that case, the workman during the midday dinner hour was at liberty to stay and take his meal on the premises or to go elsewhere. He stayed on the premises, and sat down to eat his dinner—there was no canteen provided—when a wall fell upon him and he was injured. It was argued that, as there was no break in the employment of the workman, he was entitled to claim compensation. SIR RICHARD HENN COLLINS, M.R., made these remarks, at p. 274 :

It seems to me that, notwithstanding what is alleged as to the payment being for the hours in which the applicant was actually engaged in work and not for the time in which he took his meals, we must take a broader view, and treat him as continuing in the employment of the master by the consent of the master, inasmuch as it is for the master's advantage that the workmen should have an opportunity to feed themselves. A workman would do his work all the better by taking his meal at that time, and if it is part of the contract between him and his master that he may do so upon the works instead of going away, that may be a matter of mutual convenience. A man might, for instance, live at a distance, and it might be desirable, from the master's point of view, that he should not tire himself by going to and fro for his food instead of reserving his strength for his work. It does not seem to me that, as a matter of law, it can be said that, when sitting down to his dinner, the applicant had ceased to be in his master's employment. From the mere facts that he was not paid for this particular time and that he was not engaged in the main purpose of his work it cannot, as a matter of law, be said that he had ceased to be in the employment of his master.

To the same effect, SIR H. H. COZENS-HARDY, M.R., said, at pp. 275, 276 :

I gather, however, from the admissions that there was a contract by which the applicant was to be paid at the rate of so much an hour for the time that he was actually at work, and that it was a term of the contract that the dinner hour might be spent either on or off the premises. If it had been part of the contract, as it is in some employments, that the dinner hour should be taken on the premises, there could not have been a doubt that an accident occurring during the dinner would have occurred in the course of the employment, because by the contract the

workmen would be bound to be on the premises. In my view it can make no difference if the fact is that by the terms of the particular engagement the workman was to have the right, if so minded, to get his dinner on the employer's premises. I think it would be to place a narrow construction on the Act if we held that the accident to the applicant did not occur in the course of his employment.

That case was considered by this court in *Brice v. Edward Lloyd, Ltd.* (2). For this purpose, I need only draw attention to a passage in the judgment of FARWELL, L.J., at p. 30 :

I think a workman's employment is not confined to the actual work upon which he is engaged, but extends to those actions which by the terms of his employment he is entitled to take or where by the terms of his employment he is taking his meals on the employer's premises.

He then distinguishes cases which are unreasonable or prohibited, but no such point arises in the present case.

That is the position, so far as those cases are concerned as laid down in this court, and, on the facts, I can see nothing to distinguish the present case in principle. Whether in fact the place where the workman is permitted by the terms of his contract to have his dinner is physically actually in the same room as that in which his productive labour is done or in an upper room of the premises seems to me to make no difference at all. Nor can I see, although the possibility of a distinction is suggested in a later case to which I shall have to refer, that it makes any difference whether that permission to consume meals on the premises is given for the purpose of the convenience of the employer in having men on the premises or in order, among other things, to enable a profit to be made by the employer or by anybody else. I mention that because that question was left open by LORD SUMNER in *Armstrong, Whitworth & Co. v. Redford* (3), which is, I think, the only other case to which it is necessary to refer in this matter. That is a decision of the House of Lords, and it gave rise to a very considerable divergence of opinion. By a majority of three learned Lords to two, it was decided that, on the facts of that case, there was evidence on which the county court judge could find that the accident which befell the girl through her slipping on a step when she was going back from the canteen to the place of work did arise in the course of the employment. The facts of that case were not entirely similar to those in the present one, because apparently the geography of the premises in that case gave an opportunity to the workmen to get to the canteen from the place of work by going through the street, or, alternatively, by going through the premises. The girl actually slipped after she had used the canteen, on the stairs inside the premises. It was because of that fact, I think—namely, that she slipped on the stairs inside the premises—that two of the majority of the learned Lords decided in her favour. LORD SUMNER seems to have decided the case on that point rather than on any wider question, and LORD WRENBURY took the same view. LORD SUMNER limits his judgment to that consideration, and rather indicates that other matters might fall to be considered if the question were approached from the point of view of the use of the

canteen itself, as distinguished from the use of the means of access to the canteen. He says, at p. 85 :

If the canteen had been at a distance, or if it had been carried on for profit, the case might be different, but no opinion need be expressed about it now.

In the same case, LORD WRENBURY says, at p. 89 :

A In the present case I say no more than that I think that the girl was in the course of her employment when in hurrying down the stairs to achieve punctuality in "clocking on." She was endeavouring to comply with the duty of punctuality which she owed to the employer, and that the stairs being "very slippery" she was exposed to the danger which resulted in the accident by the fact that it was incidental to her employment . . .

B I do not find in the opinions of the majority of the House of Lords in that case any doubt thrown upon the decision in *Blovelt's* case (1) in this court, to which I have referred, which is, I think, an authority strongly in favour of the respondent in the present appeal. LORD PARMOOR does take the matter in a wider sense, I think, because he is

C concerned to consider, not only whether the accident arose by using the means of access to the canteen, but also the position generally of someone taking meals in a canteen provided. He says, at p. 86 :

D The meaning of the words "in the course of employment" has been determined in this House in the case of *Davidson (Charles R.) & Co. v. M'Robb or Officer* (4). "In the course of the employment" does not mean during the currency of the engagement, but means in the course of work which the workman is employed to do and what is incidental to it." I think that a mid-day meal is incidental to an employment such as that of the respondent, which commenced at six in the morning, and that the taking of such a meal does not in itself, and apart from special circumstances, create an interruption in the course of her employment. There are no special circumstances in the present case such as, for instance, arise when an employee is away from his work not in the course of employment, but for his own pleasure or business. In the case of *Davidson (Charles R.) & Co. v. M'Robb or Officer* (4), LORD E DUNEDIN said, referring to course of employment: "It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work, e.g., in the workman's case the taking of meals during the hours of labour."

F Notwithstanding the fact that in *Armstrong, Whitworth & Co. v. Redford* (3) LORD DUNEDIN dissented, I do not understand him to have qualified what he had previously said in *Davidson (Charles R.) & Co. v. M'Robb or Officer* (4), but rather that in this particular case of *Redford* (3) he thought that the labour had been interrupted because there was a duty to leave by an exit into a street, North Street, and that G then the employees were free to go where they liked, either to obtain dinner or for any other purpose. They had to return and clock on at 2 p.m., when the hooter sounded. LORD DUNEDIN says, at p. 81 :

H That finding seems to me to make it impossible to say that she was in the works during that hour, or occupied at a meal during her hours of labour. Why "clock on" if labour was not interrupted? The mere fact that the canteen is on the same plot of ground as the works does not, so far as I can see, alter the position.

In the present case, I do not think that that consideration arises. It is not a question of the canteen being on the same plot of ground, so that the employees are required to leave the premises altogether before they go back to the canteen, albeit they can return to the canteen,

apparently, without going outside the premises. It is a case where, as the judge tells us, the canteen is actually a part of the factory. I do not think that LORD DUNEDIN in *Redford's* case (3) was speaking of anything other than the limited facts of that case, and I think that his general observations, which I have read, and which are quoted by LORD PARMOOR in *Redford's* case (3), stand. In those circumstances, I should have found no doubt about this matter were it not for a certain observation of LORD SUMNER, who speaks of the duty of the employee to use the canteen for the purpose of meals. I cannot think that that can mean more than that, where there is a duty, no further question can arise. All the authorities seems to me to point to the fact that, if the facts be that the meal is provided on the premises and it is the normal course of employment that persons may rightly use those premises during the dinner hour, so that they are either invitees or licensees—certainly something more than trespassers—by reason of the terms of their contract, though it is not their duty to go to that canteen, it is open to a county court judge to find as a fact that, if they meet with an injury while in that canteen at that time, it is in the course of the employment.

That being so, the only question which remains is whether the county court judge was entitled to find that it arose out of the employment. On that matter, I feel even less difficulty than I do with regard to the first question. Once it is established that this accident happened in the course of the employment, it follows, to my mind, that, if at the particular spot to which the person was drawn in the course of his employment a danger is proved to exist, to quote the language of RUSSELL, L.J., in *Lawrence v. George Matthews (1924), Ltd.* (5), the workman has established facts on which a county court judge can find that the accident arose out of the employment.

The facts of the present case are these. There were provided, either by the employer or by the contractor, facilities for playing darts. An ill-directed dart may prove an extremely dangerous instrument, being in its nature rather like an arrow, with a sharp pointed end. If this man had been required to go into that room, where darts were admittedly being played, and where a dart might strike against the wall, or might without negligence strike a person—because it is not to be assumed that everybody who plays darts has the accuracy of William Tell in dealing with these things—and if his duty had been to do a specific piece of work, such as paint the wall, it could not possibly be disputed that there would be evidence that his employment had brought him into a place where he was exposed to danger—namely, the danger of these sharp instruments, which, to the employers' knowledge, were being habitually thrown about this room. Can it make any difference that he is there in the course of his employment, as a term of the contract which gives him a right to be there, rather than in the carrying out of a duty? I think that it can make none. Once it is established that it is part of the course of the employment—that is to say, that it is a term of his contract

that he should be there—the accident which arises at that point, if the place is one where there is a specific danger, is one which, I think, arises out of the employment. I think that the case falls within the fourth proposition of RUSSELL, L.J., in *Lawrence v. George Matthews (1924), Ltd.* (5), and that the county court judge was entitled on that aspect of the matter also to find in favour of the workman. It follows that, in my opinion, this appeal fails.

FINLAY, L.J. : I agree exactly, for the reasons given by SLESSER, L.J., that there was here no misdirecting himself by the county court judge, and that there was evidence upon which he could properly arrive at the findings at which he did arrive. With regard to the authorities, they have been so fully dealt with by SLESSER, L.J., and I so entirely agree with all he has said, that I do not desire to say anything. I concur in thinking that this appeal fails.

LUXMOORE, L.J. : I agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors : *William Hurd & Son* (for the appellants) ; *Raymonds* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

UNION COLD STORAGE CO., LTD. v. SIMPSON.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 31, November 1, 14, 1938.**]

Income Tax—Deductions against profits—Wear and tear—Full repairing covenant by lessee—Renewals paid for by lessor—"Actual cost"—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 6 (2), (6).

Certain premises, with the machinery and plant thereon, were let to the appellant company by a lease containing a full repairing covenant on the part of the company. The lessors, who were in fact two persons in a position to control the appellant company, were in the accounts of the company charged with all the renewals of plant of a capital nature, but the company bore the expense of renewals of a revenue nature. In these circumstances, the company claimed that the machinery and plant must be deemed to belong to them for the purposes of Sched. D, Cases I and II, r. 6, and that they were entitled to allowances for wear and tear :—

HELD : Sched. D, Cases I and II, r. 6 (6), is applicable to the case where the person carrying on the trade is the lessee of the machinery and plant, and, therefore, any deduction for wear and tear is restricted to the actual cost to the lessee of machinery or plant by way of renewal or re-instatement. As the expenditure on renewal or re-instatement was here borne by the lessors, the appellant company was not entitled to any deduction for wear and tear. The fact that a lessee subject to a full repairing covenant is deemed to be the owner of the machinery and plant by r. 6 (2) does not entitle that lessee to a deduction in respect of expenditure borne by the lessor.

[EDITORIAL NOTE.] The point here decided was decided in the same way in *Heyhoe v. Slough Theatre Co., Ltd.* (1), but in that case the taxpayer did not appear,

and it might be thought that the decision therein could not be regarded as a final authority on the subject. Here, after full argument, MACNAGHTEN, J., has come to the same conclusion as FINLAY, J., did in the earlier case.

AS TO DEDUCTIONS IN RESPECT OF WEAR AND TEAR OF PLANT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 166-169, paras. 339-344; and FOR CASES, see DIGEST, Vol. 28, pp. 52-54, Nos. 266-276.]

Case referred to :

(1) *Heyhoe v. Slough Theatre Co., Ltd.* (1933), 17 Tax Cas. 488; Digest Supp.

CASE STATED by the Commissioners for the General Purposes of the Income Tax for the City of London pursuant to the provisions of the Income Tax Act, 1918, s. 149, and the Finance Act, 1920, s. 56 (6), for the opinion of the High Court of Justice. The facts are fully set out in the judgment.

It was contended on behalf of the company (a) that the lease to the company of Dec. 29, 1921, was a full repairing lease under the terms of which it was obligatory upon the company to keep the leased plant in proper repair, (b) that the terms of the lease were binding upon the company, (c) that, under the terms of Sched. D, Cases I and II, r. 6 (2), the leased plant must be deemed to belong to the person to whom it was let and by whom the trade was carried on—namely, the company, (d) that the company's claim is exactly within the clear words of Sched. D, Cases I and II, r. 6 (1), (2), (e) that (i) Sched. D, Cases I and II, r. 6 (6), ought to be so construed as to allow the deduction claimed by the company either by excluding the operation of para. (6) from claims under para. (2) thereof or by treating the actual cost of the machinery and plant to the lessors as being for the purposes of the rule the actual cost thereof to the company, and (ii) the decision of the King's Bench Division in *Heyhoe v. Slough Theatre Co., Ltd.* (1) was wrong in law, but it was admitted on behalf of the company that its contention was inconsistent with that decision, (f) that the facts stated above do not exclude the operation of r. 6, the obligation to bear the burden of depreciation and the consequential right to allowance for depreciation resting with the company, and (g) that the company was, therefore, entitled to an allowance for wear and tear upon the machinery and plant.

It was contended on behalf of the inspector of taxes (a) that during the years under appeal the burden of the maintenance and restoration of the leased plant in its capital, as distinct from its revenue, aspect necessarily fell upon the lessors, and not upon the company, and, upon the true construction of the whole of Cases I and II, r. 6, in relation to the facts of the case, the leased plant did not fall to be regarded as let to the company during those years upon terms of the company being bound to maintain the same and deliver it over in good condition at the end of the lease within the meaning of para. (2) of that rule, and consequently the company was not entitled to any wear-and-tear allowance in respect of that plant, (b) that, as the company had incurred no capital expenditure whatever in respect of the leased plant, any deduction to

which the company might otherwise have been entitled to be disallowed by reason of the provisions of para. (6) of the rule and the authority of *Heyhoe v. Slough Theatre Co., Ltd.* (1), and (c) that the company's claim for wear-and-tear allowance in respect of the leased plant should be disallowed.

A The commissioners held that the company was not entitled to the deductions claimed in respect of depreciation of leased plant under Cases I and II, r. 6 (2), as they felt themselves bound by *Heyhoe v. Slough Theatre Co., Ltd.* (1), and from this decision the company appealed.

B *Sir Patrick Hastings, K.C., J. H. Stamp, and D. Knight Dix* for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondent.

C MACNAGHTEN, J. : The question on which the opinion of the court is desired is whether the appellant company, the Union Cold Storage Co., Ltd., is entitled to an allowance for wear and tear of certain leased machinery and plant under Sched. D, Cases I and II, r. 6. The answer to that question depends on the true meaning and effect of that rule. Para. (1) of that rule, which deals with a case where a person carrying
D on a trade is the owner of the machinery or plant used by him for the purposes of his trade, provides that :

In charging the profits or gains of a trade under [Sched. D] such deduction may be allowed as the commissioners having jurisdiction in the matter may consider just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on.

E Paras. (2) and (5) of r. 6 deal with the case where a person carrying on a trade is the lessee of the machinery or plant used by him in his trade. If the lessee is bound to maintain the machinery or plant, and deliver it up in good condition at the end of his lease, para. (2) provides that
F the machinery or plant shall, for the purpose of the rule, " be deemed to belong " to the lessee. If, on the other hand, the lessor is bound to maintain the machinery or plant in good condition, para. (5) provides that the lessor is entitled to repayment of so much of the tax charged upon the lessee in respect of the machinery or plant and deducted by
G him on payment of the rent :

... as shall represent the tax upon an amount which the commissioners consider just and reasonable as representing the diminished value by reason of wear and tear of the machinery or plant during the year.

Then comes para. (6) of the rule, which fixes a limit to the total amount which may be allowed as deductions for wear and tear over a series of
H years. The total amount must not exceed the actual cost of the machinery or plant, including any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement or re-instatement.

The appellant company are lessees of machinery and plant used by them for the purposes of their trade, and they accordingly claimed that,

since, by the lease, they were bound to maintain the same, and deliver it up in good condition, they were entitled to a "deduction" for wear and tear under r. 6 (1), (2), and the matter in dispute is whether the provisions of para. (6) preclude the maintenance of that claim. The precise terms of para. (6) require careful examination, since they are by no means as clear as could be wished. In the first place, however, it is necessary to state briefly the relevant facts which have given rise to this dispute.

The appellant company was incorporated in 1897. Its capital is no less than £12,000,000 and its business is world-wide. The capital is divided into 11,000,000 preference shares and 1,000,000 ordinary shares of £1 each. The ordinary shares are owned by Lord Vestey and his brother Sir Edmund Vestey, or else by a company called Western United Investment Co., Ltd., the capital of which has been the subject of settlements by them. Through the Western United Investment Co., Ltd., Lord Vestey and his brother can, in effect, direct the voting control of the appellant company. Before 1921, Lord Vestey and his brother had built up, independently of the appellant company, a very large business in America and elsewhere outside the United Kingdom, with assets of immense value, including ranches, cattle-breeding properties, freezing works and other works. By a lease dated Dec. 29, 1921, they demised these properties to the appellant company for a term of 21 years from Apr. 10, 1921, at a rent of £960,000 per annum. The rent is payable to three persons in Paris, and does not bear British income tax. The lease contains a full repairing covenant on the part of the appellants—namely, that they

. . . will from time to time and at all times during the said term well and substantially repair cleanse maintain amend and keep the buildings and all new buildings which may at any time during the said term be erected on and all additions made to the said demised premises and the fixtures plant machinery and insulation for the time being therein whether affixed to the said premises or not and all walls fences vaults roads sewers drains and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever and also when and so often as any fixtures plant machinery or insulation belonging to the said premises shall so require substitute other fixtures plant machinery or insulation of a similar description and value to the satisfaction of the lessors.

There is also a further provision :

. . . that the said demised premises so repaired cleansed maintained amended and kept as aforesaid will at the expiration or sooner determination of the said term quietly yield up and deliver over unto the lessors together with all additions and improvements made thereto in the meantime and all fixtures plant machinery or insulation of every kind in or upon the said premises or which during the said term may be fixed or fastened to or upon the same.

The freezing works and other works demised by the lease contain the machinery and plant which form the subject of the present claim of the appellant company for wear-and-tear allowances under r. 6. These works belong to a number of foreign subsidiary companies, all of which are controlled in the United Kingdom and form with the appellant company one business. The case states that :

The trading results of these subsidiary companies are brought into one comprehensive account in England, and by arrangement between the parties there is for

- the purpose of income tax one comprehensive assessment upon the company which includes the profits of all these foreign subsidiary companies. . . . The accounts are kept on an ordinary sound commercial basis, and the recognised distinction is drawn between maintenance and ordinary running repairs and renewals of parts, on the one hand, and renewals of units on the other hand, the former being charged to revenue and the latter to capital. All revenue expenditure on the leased plant is charged to revenue in the books of the company or the particular subsidiary company concerned and this expenditure (together with the rent paid by the company) is allowed as a deduction in arriving at the company's profits for assessment to income tax. Renewals of leased plant in the sense of renewals of a capital nature as distinct from renewals of a revenue nature have always in fact been charged by the company and its subsidiaries against the lessors, and have been borne by them. This has been so ever since the beginning of the lease, and the company itself has made no capital expenditure on the leased plant. . . .
- A** The repairs which the appellant company do as lessees, and for which the company pay, are very substantial in amount, much greater than those done by the lessors in the circumstances stated above. In the company's books, amounts are set aside annually to depreciation reserve in respect of the company's own assets, but no provision is made in respect of the leased plant. In these circumstances, the appellant company claimed that the machinery and plant must be "deemed to belong" to them for the purpose of r. 6, since they are bound by the terms of the lease to maintain it in good condition, and that they are therefore entitled to allowances for wear and tear. The inspector of taxes rejected the claim, on the ground that it was precluded by r. 6 (6), and the commissioners upheld his view.

Para. (6) is in the following terms :

- No deduction for wear and tear, or repayment on account of any such deduction, shall be allowed for any year if the deduction, when added to the deductions allowed on that account for any previous years to the person by whom the trade is carried on, will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or re-instatement.

- This para. (6) was considered by FINLAY, J., in *Heyhoe v. Slough Theatre Co., Ltd.* (1). In that case, the Slough Theatre Co. carried on the business of cinematograph exhibitors. They leased from another company a sound-projector system for a period of 10 years.

- The agreement and lease, with the supplemental agreements thereto, made between the two companies provided, *inter alia*, that the respondent company was (a) to keep the equipment in good and efficient working order, (b) to bear the cost of such upkeep, with the exception that the lessor undertook to inspect the equipment periodically and perform certain minor adjustment services free of charge, and (c) at the termination of the lease, to deliver up the apparatus in good order and condition. The payments made by the respondent company under the lease by way of rent for the hire of the equipment and the cost of replacements, etc., were admitted as deductions in computing its profits assessable to income tax, Sched. D. On appeal against assessments for 1930-31 and 1931-32, the respondent company claimed under Sched. D, Cases I and II, r. 6, an allowance for wear and tear of the equipment leased, contending (a) that, by reason of its obligations under the lease, it was within the terms of para. (2) of that rule, and (b) that, for the purpose of para. (6) of the rule, regard should be had to what would have been the actual cost to it of the equipment if it had been the owner.

It was held by FINLAY, J., that the words "actual cost" in r. 6 (6) meant actual capital expenditure, and that, as the respondent company had incurred no capital expenditure, either originally or by way of renewal,

improvement or re-instatement, it was not entitled to any deduction for wear and tear under r. 6. That decision admittedly covers the case before me, because in this case, as in the case of the Slough Theatre Co., Ltd., the appellant company has incurred no capital expenditure whatsoever, and all its revenue expenditure on the machinery and plant has—as the case states—been allowed as a deduction. All the capital A expenditure has been paid by the lessors. The special commissioners accordingly decided against the claim, on the authority of that case. However, since in that case the Slough Theatre Co. did not appear, and Sir Patrick Hastings, on behalf of the appellant company, desired to put forward arguments which had not been addressed to the judge in B the *Slough Theatre* case (1), the case was fully argued before me.

It was said on behalf of the appellant company that the provisions of r. 6 (6) are, on the face of them, inapplicable to the case where the person carrying on the trade is the lessee of the machinery or plant, since by para. (6) the deductions allowable for wear and tear are limited to the C “actual cost to that person of the machinery and plant,” and in such a case the actual cost of the machinery or plant is borne by the lessor, and not by the lessee. Therefore, the effect of para. (6), if it is applicable to the case of a lessee of plant or machinery, is to abrogate para. (2), and to deprive the lessee of the benefit expressly given to him by that D paragraph. Moreover, para. (6), it was said, abrogates also para. (5), since by its plain terms it limits the allowances which the lessor may receive in respect of wear and tear to the cost of the machinery or plant incurred by the lessee, and *ex hypothesi* the lessee will not have incurred any such cost. Para. (6), it was said, is applicable, no doubt, to the E case provided for in para. (1), where the owner of the machinery and plant is himself carrying on the trade, and ought really to have been inserted as a proviso to that paragraph, and not as a separate paragraph, apparently applying both to the case where a person carrying on the trade is the owner of the plant or machinery and also to the case where he is F the lessee of it.

The initial difficulty in accepting the contention put forward on behalf of the appellant company is that para. (6) begins with the words :

No deduction for wear and tear, or repayment on account of any such deduction. G

The words “No . . . repayment on account of any such deduction” plainly refer to the provisions of para. (5). They cannot refer to anything else. It is clear, therefore, that para. (6) was intended to deal, not only with the case where the person carrying on the trade is the owner of the machinery or plant, but also with the case where the owner of the H machinery or plant has leased the machinery and plant to the person carrying on the trade. It is certainly difficult to apply the provisions of para. (6) in the case where the lessor undertakes to maintain the machinery or plant in good condition without putting a somewhat forced meaning on the words used in that paragraph. However, there

is no difficulty in applying those provisions where the lessee undertakes that burden, since the words "actual cost" include :

. . . any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or re-instatement.

A Therefore, a lessee of the plant and machinery who, in the performance of his obligation to maintain the machinery and plant and deliver it up in good condition, incurs expenditure in the nature of capital expenditure is entitled to allowances for wear and tear up to the amount of that expenditure. Para. (6) does not, therefore, abrogate r. 6 (2).
 B It merely places a limit on the total amount which can be allowed to a lessee. It is said, moreover, by the Attorney-General that a covenant to keep plant or machinery in good condition must, in most cases, if not in all, compel the lessee to make some capital expenditure, and the provisions of r. 6 (6) confirm that statement. The concluding words of that paragraph indicate that a covenant to maintain in good condition
 C may well involve expenditure of a capital nature. Moreover, if by some accident the plant or machinery were damaged or destroyed, the lessee, under his covenant to keep in repair, would be bound to make good the damage, or supply new plant and machinery in place of that which had been destroyed, and any such expenditure would be capital
 D expenditure for the purpose of r. 6.

A second point was put forward on behalf of the appellant company. Rule 6 (2) provides that a person carrying on a trade, who is a lessee of plant or machinery and is bound by the lease to maintain and deliver it up in good condition, is to be regarded as its owner. The machinery
 E or plant "shall be deemed to belong" to him. Since he is to be deemed to be the owner, he must, it is said, be regarded as the owner in every respect. He must, therefore, be deemed to have paid out of his own pocket whatever the real owner in fact paid for the plant or machinery. I do not think that this argument can prevail. If, as I hold, para. (6)
 F does apply to the case where the person carrying on a trade is the lessee of the machinery or plant, then the limitation of the allowances for wear and tear to the "actual cost to that person" makes it, as I think, impossible to construe the words "actual cost to that person" so as to include expenditure which has in fact been incurred, not by the lessee, but by
 G his lessor. Since, in the present case, the appellant company have incurred no capital expenditure of any sort on the plant and machinery leased to them—the whole of that expenditure having been defrayed by their lessors—I am of opinion that the commissioners came to a correct decision, and the appeal must be dismissed with costs.

H *Appeal dismissed with costs.*

Solicitors: *Pinsent & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

ONESIMUS DOREY & SONS, LTD. *v.* HEADLEY'S WHARF.
LTD., AND WILLIAM ASHBY, LTD.

[KING'S BENCH DIVISION (Branson, J.), **November 28, 29, 30, December 1, 2, 5, 9, 1938.**]

Waters and Watercourses—Wharves—Safety of berth—Invitation to ship to berth—Arrangement for ship to go to berth adjoining her usual berth—Berth unsafe for particular ship—Liability of wharfinger. A

The plaintiffs were the owners of a coasting vessel, the Belvedere, and the defendants were respectively the owners of A.'s wharf and H.'s wharf, which adjoined each other on the south side of Deptford Creek. The charterers of the Belvedere had on many occasions in the past used H.'s wharf, but on this particular occasion it was known to them that there was not room at this wharf until another vessel left, and, accordingly, as the tides were falling, arrangements were made two days before the arrival of the Belvedere for her first to berth at A.'s wharf and unload part of her cargo there, and, later, when there was room, to move to H.'s wharf. She was berthed with her bow 16 ft. short of the upper end of A.'s wharf and overlapped the upper end of H.'s wharf by some 50 ft., but, owing to insufficient keel support, she sagged, and suffered damage. It was found that H.'s wharf issued no invitation to the Belvedere to go to A.'s wharf, or to lie partly on A.'s berth and partly on their own, but that A.'s wharf did invite the charterers to bring a vessel to their wharf, but that they were not informed of the name or size of the vessel:— B C

HELD: there was no contractual relationship between the plaintiffs and the defendants, or either of them, and no duty upon either of the defendants of ascertaining whether or not it was safe to berth the Belvedere where she was in fact berthed. D

[EDITORIAL NOTE.] The question at issue here was whether the facts taken as a whole amounted to an invitation by both defendants or either of them to the ship to berth at the place where she did. It was found that the facts did not in law amount to such an invitation, and, as there is no general invitation by a wharfinger to any and every ship passing his wharf to come and berth alongside, the action failed. E

AS TO SAFETY OF BERTH, see HALSBURY, 1st Edn., Vol. 28, pp. 423, 424, para. 837; and FOR CASES, see DIGEST, Vol. 44, pp. 103, 104, Nos. 826-831.] F

Cases referred to:

- (1) *The Moorcock* (1889), 14 P.D. 64; 44 Digest 104, 828; 58 L.J.P. 73; 60 L.T. 654.
- (2) *The Bearn*, [1906] P. 48; 41 Digest 980, 8690; 75 L.J.P. 9; 94 L.T. 265.
- (3) *Tredegar Iron & Coal Co. v. Calliope (Owners), The Calliope*, [1891] A.C. 11; 44 Digest 104, 829; 60 L.J.P. 28; 63 L.T. 781. G

ACTION for damages for breach of an alleged contract to provide a suitable berth for the plaintiff's vessel. 'The facts are fully set out in the judgment.

G. St. Clair Pilcher, K.C., and *A. A. Mocatta* for the plaintiffs. H

H. U. Willink, K.C., and *H. G. Willmer* for the first defendants.

Sir Robert Aske, K.C., and *Cyril T. Miller* for the second defendants.

BRANSON, J.: The plaintiffs are the owners of the Belvedere, a coasting vessel 194 ft. long between perpendiculars and 30 ft. 7 ins. in

breadth. The defendants are respectively the owners of Ashby's Wharf and Headley's Wharf, which adjoin each other on the south side of Deptford Creek. The Belvedere was chartered by A. & F. Manuelle, Ltd., to load a cargo of stone in Guernsey and to carry it to Headley's Wharf, the charterers having a contract with the first defendants under which the first defendants had a first call upon cargoes which the charterers might bring to London. The charterers used Headley's Wharf a great deal, handling some 30,000 tons there annually, and had a representative continuously present at the wharf. The Belvedere was expected to be ready to berth on the morning tide of Dec. 6, 1937. It was known to her charterers that, owing to the fact that there were other ships, one of which was the Multistone, berthed at Headley's Wharf, there would be no room for the Belvedere before the Multistone left, which she was expected to do on the afternoon tide of Dec. 6. The tides were falling off and the Belvedere was fully loaded, and it was known to the charterers that, if she could not get into Deptford Creek on the morning tide of Dec. 6, she would in all probability be neaped, and unable to get in for some days. On Dec. 4, therefore, it was arranged that she should go to Ashby's Wharf on Dec. 6, and there unload about 50 tons of cargo, and that she should then, when the Multistone should vacate her berth at Headley's Wharf, be moved to Headley's Wharf to finish her discharge there. Much will depend upon the nature of this arrangement, and on the disputed question as to who were the parties to it, matters which I shall consider in detail later. It is sufficient at the moment to say that, in pursuance of it, the Belvedere was brought up the creek by her master, piloted by a licensed waterman, Barnard, who habitually piloted ships using the creek, and who was paid for so doing, in the present case by the plaintiffs.

Both Barnard and the master were aware that they had no time to lose if they were to get alongside Ashby's Wharf on that tide. An attempt was made on behalf of the second defendants to impugn the master's seamanship by suggesting that he came up to the berth with too much way on his ship, and so ran her on to a part of the berth where the bottom was somewhat high. The master denied that he had used any excessive speed, and stated that he so manœuvred the ship as to place her where Barnard told him to go.

It is common ground that the ship's stern was 16 ft. short of the end of the berth, and the surveys show that the bottom of the berth was considerably higher there than it was 30 ft. or 40 ft. further downstream. I am satisfied that the master did not use excessive speed. He himself says that, on Barnard's advice, he did, when his bow touched the mud and the ship lost her way, go full astern for a few seconds and come half-ahead again twice before he got into the berth. Captain McGlashen, called by the second defendants, said that this, too, was a wrong thing for the master to have done. His reasons were twofold, (i) that this forced the Belvedere's bow on to the high part of the berth, and (ii) that

by going full astern he might have washed a heap of mud up under his vessel's keel, upon which she would sit when the tide went down. The master had never been to Ashby's Wharf before, and he was being piloted by Barnard, who, to his knowledge, piloted most of the ships that used the creek. I cannot think that he showed any negligence in following Barnard's directions. If he had not gone up so far along Ashby's Wharf, he could not have got his stern past the bow of the Multistone, and must have left his ship angled out across the creek, as, indeed, the defendants allege she was left. A

The first defence of the defendants is that the Belvedere never in fact got into the berth at all. Her master swore that, by dint of going ahead and astern as he did, he got his stern 5 ft. or 6 ft. past the bow of the Multistone, then got a stern wire made fast to the quay, and hove his stern in to about 5 ft. or 6 ft. from the quay. He said that, in heaving his stern in, his stern wire pressing on the bow of the Multistone hove her out of berth, and that the crew of the Multistone had to be aroused to put their ship back into berth. In this he is corroborated by the boatswain, O'Hare, and by Keen, the mate of the Multistone, and I have no doubt that the Belvedere did get alongside into the position stated by the master. B C

The position of the Belvedere was that, with her bow 16 ft. short of the upper end of Ashby's Wharf, she overlapped the upper end of Headley's Wharf by some 50 ft. Those portions of the two berths on which she lay have been surveyed, and an agreed plan shows the result of the survey. From this, it appears that a ship which was not too long to lie wholly on the berth opposite Ashby's Wharf could lie there in safety. There was evidence that 238 ships had used that berth between May, 1934, and Oct., 1938, without any one of them having been damaged. Headley's Wharf by itself was also perfectly safe. A surveyor is employed to survey it periodically, to ensure that it remains in proper condition, and it had been so surveyed a few days before the end of November. D E F

The trouble in the present case arises from the fact that the upstream part of Ashby's Wharf rises considerably above the level of the downstream part, and the upstream end of Headley's Wharf is higher than the downstream end of Ashby's. The result is that the Belvedere, reaching, as she did, from the high part of Ashby's berth to the high part of Headley's, was resting with her bow on the one and her stern on the other, and with 140 ft. of her keel unsupported except for such support as the mud could afford. This was insufficient, and she suffered damage from sagging. I am not concerned with the amount of the damage, but only with the question whether either, and, if so, which, of the two defendants is responsible for it. G H

The plaintiffs' contention is that the two defendants are jointly responsible. They argue that the ship was consigned to Headley's, who, being unable to receive her at the moment when she was expected, and being unwilling to lose the whole business of discharging her, arranged

with Ashby's to receive her and discharge a part of her cargo, and then to hand her over to them to finish. This arrangement, being communicated by Headley's through Barnard to the master, constituted, it is said, a joint invitation by both the defendants, or, alternatively, by Headley's alone, to the ship to come into the berth which she occupied, and renders
 A the defendants, or Headley's alone, as the case may be, liable for the damage the ship sustained by going there.

Headley's, on the other hand, contend that all they did was to assent to a suggestion made to them by the charterers that the charterers should send the ship to Ashby's in the first instance, and they deny that
 B they in any way invited her to go there. Ashby's case is that they too have no responsibility in the matter, as they did not know what ship it was that the charterers wanted to berth in their berth, and so were quite unable to form any opinion as to its suitability to receive her. No one in the present case made any express representation, or undertook
 C any express responsibility, as to the safety of the Belvedere if she were berthed where she was in fact berthed.

In order to see what, if any, implications arise, it is necessary to determine what passed between the persons by whom it was arranged that she should go there. The plaintiffs did not call Lagden, the
 D charterers' representative on Headley's Wharf, or Barnard, the waterman whom the ship employed to pilot her, and the evidence as to the arrangement was given by Enmarsh, the manager of Headley's Wharf, Prinn, Headley's foreman, and Stoppard, Ashby's foreman. Upon this evidence, I find the facts as follow. On the morning of Dec. 4, Lagden asked
 E Enmarsh if he would mind if the Belvedere went to Ashby's, as Headley's was full. Enmarsh said that he did not mind, and that it was up to Lagden to decide where she should go. Lagden then asked if Headley's foreman, Prinn, might come with him to Ashby's to introduce him to Ashby's manager, Stoppard, who was personally unknown to him, and
 F Enmarsh agreed. Lagden then found Prinn, and told him that he was to accompany him to Stoppard. Prinn introduced Lagden, and Lagden asked Stoppard if he would take 50 tons out of a ship that was coming on Monday. Stoppard said that he was asked to oblige Headley's or the charterers, but he ultimately agreed that it was a matter of business,
 G and that he would have taken the ship even if Lagden had come without Prinn. Then Stoppard told Lagden that he would take the ship if the berth was clear when she arrived, and, later on in the day, he agreed definitely with Lagden that she should go there. Lagden informed Prinn of this, and, when Barnard, who had been engaged by Lagden to pilot
 H the Belvedere in, inquired of Prinn what the final arrangements were, Prinn told him that the Belvedere was to go to Ashby's. This was in no sense an instruction by Headley's to Barnard, but was merely a passing on by Prinn of the information which he had received from Lagden. Stoppard swore (and his evidence on this point was uncontradicted) that he was not told what ship it was that Lagden proposed to send to his

wharf, and that he first knew the name of the ship when he saw the Belvedere there on the Monday morning.

It is clear on this set of facts that Headley's issued no invitation to the Belvedere to go to Ashby's Wharf, or to lie partly on Ashby's berth and partly on their own, and so cannot be held to have come under any duty, contractual or other, towards the Belvedere in regard to the bottom of the creek. Ashby's did invite the charterers to bring a vessel to their wharf, the length of which was known to the charterers, but, as they were not informed as to what vessel it was, they cannot be held to have invited the charterers to bring a vessel which could not lie on their berth without overlapping on to one or other of the neighbouring berths.

I was urged to hold that, by some sort of implication, Headley's and Ashby's had combined to invite the Belvedere to lie where she in fact lay. The authority for making such an implication was said to be found in *The Moorcock* (1) and *The Bearn* (2). The first of these cases deals only with the principle upon which the court will imply a term into a contract. The appellants had contracted with the respondent for the respondent to bring his barge alongside the appellants' wharf. LORD ESHER, M.R., says, at p. 67 :

What, then, is the reasonable implication in such a contract ?

In the same case, BOWEN, L.J., begins the often-quoted passage by saying, at p. 68 :

The question which arises here is whether when a contract is made to let the use of this jetty to a ship . . . there is any implied warranty on the part of the owners of the jetty . . .

Later, BOWEN, L.J., says, at p. 70 :

This is a business transaction as to which at any moment the parties may make any bargain they please, and either side may by the contract throw upon the other the burden of the unseen and existing danger. The question is what inference is to be drawn . . . where they say nothing about the burden of this kind of unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction.

There is no contractual relationship between the plaintiffs and the defendants in the present case, so the decision in *The Moorcock* (1) does not avail the plaintiffs. The case of *The Bearn* (2) is difficult to follow, so far as that part of the decision is concerned which makes the railway company responsible to the shipowner whose ship was berthed alongside its quay. There does not, judging from the report, appear to have been any contract between the shipowner and the railway company, and BARGRAVE DEANE, J., said, at p. 60 :

On this occasion the pilot was told by the broker to take the ship to this particular wharf, and it was taken to that wharf for this reason, that the cargo was chiefly flour, and was consigned to Messrs. Rubie & Adams, who are lessees from the railway company of a warehouse on this wharf, and at that warehouse this cargo was to be unloaded and stored. That is what was done, and the railway company received through Messrs. Rubie & Adams, the consignees of the cargo, fees and dues which this vessel had to pay for using their wharf—fees and dues, as I understand, which they have the power to levy under their own private Act of Parliament. That surely imposes a duty upon the railway company, if they

invite vessels to come to their quay for the purposes of the wharf of the railway company. There was, I think, quite apart from the question of *The Moorcock* (1), although that is very much in favour of the view I am taking, an implied warranty to any vessel coming in there that she is to be placed in a proper and safe berth.

Again, BARGRAVE DEANE, J., said, at p. 62 :

A The other case is that of the railway company. They have a duty imposed upon them, by reason of the fact that they are allowed to make charges there by inviting vessels for reward to come to their wharf, to see that the berth where these vessels are to lie, it being a berth at which vessels have to take the ground at low water, is fit and proper for a vessel to take the ground on.

B Then, although there was apparently no contractual relationship between the railway company and the shipowner, the judge proceeds to base his judgment upon *The Moorcock* (1). In the Court of Appeal, SIR RICHARD HENN COLLINS, M.R., at p. 76, and ROMER, L.J., at p. 82, both base their decision on *The Moorcock* (1), and the former, at p. 78, does not approve the passage in the judgment of BARGRAVE DEANE, J., in which
C he suggests that the wharf-owner comes under some liability other than that referred to in *The Moorcock* (1). It is not easy to believe that the court in *The Bearn* (2) misapplied the decision in *The Moorcock* (1) in this way, and one is driven to the conclusion that there must have been some contract between the ship and the railway company, or something
D in the railway company's statutes which is not noticed in the report which the court treated as constituting some contract. I have gone carefully into this case, because it was pressed upon me, but it is not, in my view, material upon the facts as I have found them, even if it does go so far as to decide that an invitation given by a wharf-owner to A. to bring a certain ship alongside his wharf results in an implied contract
E between the wharf-owner and B., the owner of the ship, whereby he undertakes that, in the absence of notice to the contrary, he has taken all reasonable steps to make the berth secure for that ship. There being in this case no invitation from either defendants to the charterers of the Belvedere to put her where she was put, there can be no implied contract
F with her owners as to the condition of the berth at that spot.

It was further suggested in argument that anyone who maintains a wharf on the bank of a navigable river invites any passing ship that chooses to come and berth alongside, so that a contract arises when the invitation is accepted by the ship coming alongside without any previous
G arrangement. It seems to me that such a proposition has only to be stated to carry its own refutation. It would render business impossible. If any authority is wanted to show that no such burden is in fact placed upon a wharf-owner, it is to be found in the words of LORD HERSCHELL in *Tredegar Iron & Coal Co. v. Calliope (Owners)*, *The Calliope* (3), at
H p. 27 :

My Lords, what was their duty ? Was it to keep the bed of the river adjoining their wharf in such a condition as that at all tides any ship, however heavy her draught, might come in ? Such a proposition surely can hardly be contended for.

For these reasons, I am of opinion that it is not possible by implication to place upon either of the defendants the duty of ascertaining whether

or not it was safe to berth the Belvedere where she was in fact berthed. This action, therefore, fails.

Action dismissed with costs as against both defendants.

Solicitors: *Holman, Fenwick & Willan* (for the plaintiffs); *Keene, Marsland, Bryden, Besant, Batham & Cork* (for the first defendants); *William Charles Crocker* (for the second defendants).

[Reported by MAURICE SHARE, Esq., *Barrister-at-Law.*]

GREENWOOD v. ATHERTON.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.),
December 6, 1938.]

Public Authorities—Limitation of actions—What bodies protected—School managers and headmistress—Injury to child through want of supervision—Public Authorities Protection Act, 1893 (c. 61) s. 1.—Education Act, 1921 (c. 51), ss. 29, 30, 31.

The plaintiff, an infant, was injured at school during an authorised recreation period by the swinging to of a pair of iron gates, which crushed his hand. The accident happened on Apr. 8, 1937, and on Nov. 10, 1937, more than 6 months later, a writ was issued against the defendants, who were respectively headmistress and managers of the school, claiming damages for breach of duty. The defendants pleaded the Public Authorities Protection Act, 1893. The school was a non-provided voluntary school, which, under the Education Act, 1921, received a grant towards the cost of education. The school and its body of managers were in existence before the passing of the Education Act, 1921. For the purposes of carrying out the provisions of the Act, supervision and instruction, including recreation, were among the duties which the managers, with the assistance of the headmistress, had to perform. The plaintiff contended that the duty of supervision was not a public duty, but was owed to a particular class of children:—

HELD: (i) the managers were a statutory body acting in the execution of the Education Acts.

(ii) the duty of supervision was a duty owed to all the children who attended the school, and was a public duty protected by the Public Authorities Protection Act, 1893.

(iii) the headmistress was acting as the servant of the managers.

(iv) the action was, therefore, barred as being out of time.

Decision of LEWIS, J. ([1938] 2 All E.R. 475) affirmed.

[EDITORIAL NOTE. The parties seeking the protection of the Public Authorities Protection Act were here attacked on two grounds. It was said first that they were not a public authority. Although the Act refers to "any person" and any act done in pursuance or execution or intended execution of any Act of Parliament or any public duty, it is well established that it does not in fact apply to any person, but only to public authorities. Before this decision, it had not in terms been decided that the managers of a non-provided school were within the Act. It was also argued that the duty here in question was not owed to the public in general, but to the particular class of children attending the school. This contention was rejected.

AS TO PUBLIC AUTHORITIES PROTECTION ACT, 1893, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 290-297, paras. 609-616; and FOR CASES, see DIGEST, Vol. 38, pp. 101-112, Nos. 725-795.]

Cases referred to :

- (1) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242 ; 38 Digest 110, 784 ; 85 L.J.K.B. 146 ; 114 L.T. 83 ; *affg.*, [1915] 1 K.B. 417.
- (2) *Young v. Cuthbert*, [1906] 1 Ch. 451 ; 19 Digest 555, 13 ; 75 L.J.Ch. 217 ; 94 L.T. 191.
- (3) *Gillow v. Durham County Council*, [1913] A.C. 54 ; 19 Digest 560, 32 ; 82 L.J.K.B. 206 ; 107 L.T. 689.
- (4) *Harries v. Crawfurd*, [1918] 2 Ch. 158 ; 19 Digest 562, 45 ; 87 L.J.Ch. 465 ; 119 L.T. 200 ; *affd.*, [1919] A.C. 717 ; 88 L.J. Ch. 477 ; 121 L.T. 398.
- (5) *Smith v. Macnally*, [1912] 1 Ch. 816 ; 19 Digest 605, 305 ; 81 L.J.Ch. 483 ; 106 L.T. 945.

B APPEAL by the plaintiff from a judgment of LEWIS, J., without a jury, at Manchester, dated Mar. 21, 1938, and reported [1938] 2 All E.R. 475, where the facts are fully set out.

Joseph Lewis for the appellant.

J. C. Jolly for the first respondent, the headmistress.

Ralph Etherton for the second respondents, the managers of the school.

C *Lewis* referred to *Bradford Corpn. v. Myers* (1), *Young v. Cuthbert* (2), *Gillow v. Durham County Council* (3), *Harries v. Crawfurd* (4) and *Smith v. Macnally* (5).

D **MACKINNON, L.J.** : In this case, the plaintiff, a small boy suing by his next friend, brought an action against the defendants claiming damages for personal injuries alleged to be due to negligence by the defendants or by their servants or agents. The first defendant was Miss Atherton, the headmistress of a non-provided school, and the other defendants were the managers of that school. The accident happened on Apr. 8, 1937.

E and the writ was issued on Nov. 10, 1937. As the result of those dates, the defendants pleaded in their defence :

The defendants will rely upon the Public Authorities Protection Act, 1893, s. 1.

That question—a question of law—was, by agreement of the parties, or

F by some order of the judge, tried as a preliminary question, without the actual facts of the matter being gone into, and, after hearing argument upon it, LEWIS, J., upheld the objection, and held that the Act did apply, and that, as the writ had not been issued within 6 months of the occurrence, the case could not be pursued. From that decision upon that point

G the plaintiff appeals to this court. We have heard careful argument from Mr. Lewis, and it is no discredit to that argument if I say that, in my view, the matter is quite unarguable. I think that it will be sufficient for my own satisfaction if I say that I agree with all that was said by LEWIS, J., in his very careful judgment, and I think that he expresses the

H point with so much clarity that it is hardly necessary to add anything to it.

The school in question is, within the Education Act, 1921, a public elementary school. Sect. 27 (1) of that Act provides as follows :

Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act. . . .

Then sect. 28 deals with one of the two classes of public elementary

school, "every elementary school provided by a local education authority. . . ." Then sect. 29 deals with the class of school of which this is one :

The local education authority shall be responsible for, and have the control of, all secular instruction in public elementary schools not provided by them.

This was a public elementary school not provided by the local authority, but, under that section, they were responsible for it, and had control of it. With regard to the facts which have been opened, the Public Authorities Protection Act, 1893, s. 1, provides :

Where any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament [then the action must be taken within the limited period].

I think that it is manifest that, within the clearest meaning of those words, these defendants, the managers, as managing the school—managing a public elementary school governed by the Education Act, 1921—were providing this playground where the accident happened, and doing the acts in pursuance, or execution, or intended execution, of the Act of Parliament—namely, the statute of 1921. That being so, it follows that any suit brought against them in respect of such an act must be commenced within the 6 months limited by the Act. Since the plaintiff has not done so, the resulting penalty under the statute applies, with the result that I think that this case was quite rightly decided by LEWIS, J., and that this appeal must fail.

GODDARD, L.J. : I agree, and, in view of the judgment of LEWIS, J., I have nothing to add. It is quite true that LORD BUCKMASTER, L.C., in *Bradford Corpn. v. Myers* (1), with regard to the section to be construed, says, at p. 247 :

. . . it would be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the courts have pointed out that this cannot be its true interpretation, and that "any person" must be limited so as to apply only to public authorities.

I think the answer that must be made to the argument of Mr. Lewis, founded on those words of LORD BUCKMASTER, L.C., is this. The managers are, as LEWIS, J., pointed out, a statutory body. They are appointed now under the Act. It is quite true that before this Act there were foundation managers, but the Act now provides for this body as the body of managers. The second point is that, in the *Bradford* case (1), LORD BUCKMASTER, L.C., is speaking of persons who are acting in pursuance of a private Act, such as a railway company, for instance. These foundation managers are acting in pursuance of a public duty. It seems to me really quite impossible to say that they are not a public authority, and not acting in pursuance of a statutory duty, and, although it may be they cannot be compelled to keep the school in existence, so long as they are in receipt of a grant from public funds, I do not see how

it can be said that they are not public authorities. For that reason, I agree that this appeal must fail.

DU PARCQ, L.J. : I agree with what has been said in both judgments which have been delivered, and have nothing to add.

A *Appeal dismissed with costs.*

Solicitors: *Tylee & Co.*, agents for *Exton & Southworth*, Bury (for the appellant); *Eric G. Floyd* (for the first respondent); *Norton, Rose, Greenwell & Co.*, agents for *Sir George Etherton*, Preston (for the second respondents).

B [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

LOWRY v. CONSOLIDATED AFRICAN SELECTION TRUST, LTD.

C [KING'S BENCH DIVISION (Macnaghten, J.), November 10, 1938.]

Income Tax—Deductions against profits—Remuneration of employees—Issue of shares of nominal value.

D A company issued 6,000 ordinary shares to its employees at par, the par value being 5s. The market value at the time was £2 3s. 9d. The employees were assessed to tax in respect of the difference between the market value and the par value. It was contended that the difference between the par value and the market value of all the shares so issued was deductible against the profits of the company as a revenue expense :—

HELD: the company could not deduct the difference between the par value and the market value as a revenue expense.

E [EDITORIAL NOTE. The contention on behalf of the company in this case was that the amount of the difference between the par value and the market value was an amount forgone by the company. It was argued that, if the company had issued the shares in the open market, they would have received the premium, and could have used the sum so received in providing for their employees the remuneration which in fact they provided by the issue of the shares direct to the employees. If the remuneration had been paid in cash to the employees, that sum would have been a proper deduction as a revenue expense, and it was argued that a like sum ought to be deducted in the case where the shares were issued.]

F AS TO DEDUCTIONS AGAINST PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 150-156, paras. 311-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.]

G Cases referred to :

- (1) *Salmon v. Weight* (1935), 153 L.T. 55; Digest Supp.; 19 Tax Cas. 174.
- (2) *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1934] 1 K.B. 548; Digest Supp.; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280.
- (3) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 28 Digest 56, 287; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *revsq.*, [1914] 2 K.B. 891.
- H** (4) *Re Wragg, Ltd.*, [1897] 1 Ch. 796; 9 Digest 310, 1928; 66 L.J.Ch. 419; 76 L.T. 397.
- (5) *Banco de Portugal v. Waterlow & Sons, Ltd.*, *Waterlow & Sons, Ltd. v. Banco de Portugal*, [1932] A.C. 452; Digest Supp.; 101 L.J.K.B. 417; 147 L.T. 101.
- (6) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 28 Digest 52, 264; 95 L.J.K.B. 336; 134 L.T. 289; 10 Tax Cas. 155; *affg.*, [1925] 1 K.B. 421.

- (7) *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; 28 Digest 81, 445; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481.
- (8) *Inland Revenue Comrs. v. Ramsay* (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79.
- (9) *Inland Revenue Comrs. v. Bell* (1927), 12 Tax Cas. 1181.

CASE STATED by the Commissioners for the General Purposes of the Income Tax Acts for the City of London pursuant to the provisions of the Income Tax Act, 1918, s. 149, for the opinion of the High Court of Justice. The facts of the case are fully stated in the judgment. A

It was contended on behalf of the company :

- (a) That a sum equal to the difference between the par value and the market value of the shares issued to the employees being remuneration for their services and being an amount forgone by the respondent was a legitimate deduction in computing the profits of the respondent for income tax purposes. B
- (b) That had the respondent issued the shares in the open market, it could have utilised the premium it would then have received for the purpose of paying the aforesaid remuneration.
- (c) That in such case the respondent's right to debit the said remuneration for the purpose of computing its profits for income tax purposes could not have been questioned; and that such right was not defeated merely because the respondent had adopted a shorter and more businesslike method. C

It was contended on behalf of the inspector of taxes :

- (a) That no expense had been incurred by the respondent in connection with the transactions in question.
- (b) That if any expense had been incurred it had been incurred on capital account and not on revenue account. D
- (c) That upon allotment of the shares nothing had been forgone by the respondent because, for good commercial reasons, the respondent had decided that the shares should be issued to certain of its employees at par.
- (d) That if anything had been forgone it was a premium upon the issue of the shares and was forgone on capital account and not on revenue account.
- (e) That the deduction claimed was not a deduction allowable in computing profits and should be refused. E

The following cases were referred to before the commissioners : *Salmon v. Weight* (1), *Re Wragg, Ltd.* (4), *Banco de Portugal v. Waterlow & Sons, Ltd.* (5), *Golden Horse Shoe (New), Ltd. v. Thurgood* (2), *British Insulated & Helsby Cables v. Atherton* (6), *Bradbury v. English Sewing Cotton Co.* F (7), *Inland Revenue Comrs. v. Ramsay* (8) and *Inland Revenue Comrs. v. Bell* (9).

The commissioners decided in favour of the inspector of taxes.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the inspector of taxes.

J. Millard Tucker, K.C., and T. N. Donovan for the company. G

MACNAGHTEN, J. : The company in this case was incorporated on Oct. 11, 1924, under the Companies Acts, 1908 to 1917, as a company limited by shares with a capital of £250,000, divided into 1,000,000 shares of 5s. each. By a special resolution passed on Dec. 6, 1933, the capital was increased to £600,000 by the creation of 250,000 redeemable preference shares of £1 each and 400,000 new ordinary shares of 5s. each, ranking *pari passu* with the existing ordinary shares of the company. H

By the special resolution increasing the capital of the company, it was

also resolved that 10,000 of the new ordinary shares should be reserved for issue to employees of the company at such time or times, and under such terms and conditions, as the directors should determine. In the following year, on June 6, 1934, the directors, pursuant to the authority given to them by that resolution, determined to offer 6,000 of the

A ordinary shares to the employees of the company at par. The letter informing the employees of that decision stated that the directors desired to show their appreciation of the special services that the employees had rendered to the company by giving them an opportunity to acquire a share interest in the company on favourable terms. The

B shares were offered to the employees at their nominal value of 5s. per share. At that time, the shares, which were quoted on the London Stock Exchange, were saleable in the market at between £2 and £2 5s. per share. Thus, the issue of the shares at par amounted in fact to a gift of something more than £2 per share. The question raised in this

C case is whether, in the assessment to income tax made upon the company under the rules applicable to Sched. D for the financial year ended Apr. 5, 1937, the difference between the nominal value and the market value of the shares issued to the employees should be included as a revenue expense. Following the decision in *Salmon v. Weight* (1), the employees

D have been assessed to tax upon that sum, as part of their emoluments in the service to the company.

I have had the advantage of listening to Mr. Tucker's lucid argument in support of the view which found favour with the general commissioners. His argument, as I understand it, is this. The company,

E by issuing these shares at 5s. to their employees, forwent the premium which they might have got if they had issued the shares on the market, and, therefore, they must be treated (and this is the jump that he takes which I find myself unable to take with him) as if they had disbursed that amount. In support of his argument, he cited *Golden Horse Shoe*

F (*New*), *Ltd.* v. *Thurgood* (2). In that case, the company had acquired a dump, consisting of the tailings of a gold mine—tailings which contained some gold which could by some process be extracted. The company acquired this dump by paying for it in shares credited as fully paid. The vendors got the shares and *Golden Horse Shoe (New), Ltd.*, got the dump.

G The question in that case was whether the cost of the dump could properly be regarded, not as a capital, but as a revenue, expense. That question was decided in favour of the company, and the cost of the dump was carried into the accounts as a revenue expense at a sum equal to the nominal value of the shares which had been given in exchange for it.

H That was the price at which the company had agreed to buy the dump, and, therefore, that was the sum to be inserted in the revenue account as their cost. If in that case the court had said that, for the purposes of the revenue account, the price which the company paid in shares should be disregarded, and some other value should be placed on the dump, that might have assisted the argument of Mr. Tucker, but, since

the nominal value of the shares issued in exchange for the dump was taken to be the amount which it had cost, I do not think that it assists his argument at all. The simple answer to the claim put forward is that which I have already indicated. The fact that the directors thought it advisable to let the employees have these shares at a price below that which could be obtained from the public is no justification for treating the premium which the company might have obtained, but did not in fact obtain, as an expense. Moreover, the premium, if it had been obtained, would have been a capital receipt. It does not seem to me that *Usher's* case (3) has any application to the question before me. In that case a brewery company owned tied houses which were included in their brewery business for the purpose of assessment to income tax. The tied tenants paid rents which were less than the Sched. A assessments of the licensed houses. The loss that the brewery company incurred by reason of that part was held to be a loss which should be included in the revenue account as an expense of the trade. That has no bearing upon this matter, where the question is: Can the company treat as an expense in the conduct of their business the advantage or benefit which they gave to their employees by permitting them to subscribe for shares at a price less than that at which others would pay for them? I think that the general commissioners were mistaken in the view which they took of the matter, and the appeal must be allowed. B C D

Appeal allowed, with costs.

Solicitors: *Solicitor of Inland Revenue* (for the inspector of taxes); *Freshfields, Leese & Munns* (for the company).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.] E

UNION COLD STORAGE CO., LTD. v. ELLERKER.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 31, November 1, 2, 14, 1938.**] F

Income Tax—Deductions against profits—Consideration for surrender of lease—Whether payment for the purpose of carrying on the trade—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 3.

In 1901, the appellant company were granted for a term of 40 years a lease of land upon which a warehouse was to be erected by the lessors, the rent being based partly upon the cost of erection. In 1932, when the lease had still 10 years to run, the company, finding that they had sufficient storage elsewhere, agreed with the lessors to surrender the lease for £6,000. It was contended that this sum of £6,000 was a proper deduction against the profits of the company:— G

Held: the payment for the surrender of the lease was not a disbursement for the purpose of carrying on the trade of the company, but was for the purpose of putting an end *pro tanto* to that trade, and was, therefore, not a proper deduction against profits. H

[EDITORIAL NOTE.] The question here is not decided upon the footing whether the payment in respect of the surrender of the lease was a capital or a revenue payment. Before that question could arise, it would have to be found that the

payment was one made for the purpose of carrying on the trade of the company. The view taken of the facts of the present case is that this payment was made, not for the purpose of carrying on the trade of the company, but for the purpose of putting an end to part of the trade of the company.

AS TO DEDUCTIONS AGAINST PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 150-156, paras. 311-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.]

Cases referred to :

- (1) *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K.B. 674; 28 Digest 52, 262; 83 L.J.K.B. 1721; 111 L.T. 848; 6 Tax Cas. 477.
- B (2) *Mitchell v. Noble (B. W.), Ltd.*, [1927] 1 K.B. 719; Digest Supp.; 96 L.J.K.B. 484; 137 L.T. 33; 11 Tax Cas. 372.
- (3) *Inland Revenue Comrs. v. Falkirk Iron Co., Ltd.*, [1933] S.C. 546; Digest Supp.; 17 Tax Cas. 625.
- (4) *Cowcher v. Mills & Co., Ltd.* (1927), 13 Tax Cas. 216; Digest Supp.
- (5) *Mallett v. Staveley Coal & Iron Co., Ltd.*, [1928] 2 K.B. 405; Digest Supp.; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772.
- C (6) *Green v. Favourite Cinemas, Ltd.* (1930), 15 Tax Cas. 390; Digest Supp.
- (7) *Eastmans, Ltd. v. Shaw, Eastmans, Ltd. v. Inland Revenue Comrs.* (1928), 45 T.L.R. 12; Digest Supp.; 14 Tax Cas. 218.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment. The contentions before the commissioners were as follow. On behalf of the company, it was contended that the sum of £6,000 paid by the company to get rid of the warehouse was money wholly and exclusively laid out or expended for the purpose of the trade. On behalf of the inspector of taxes, it was contended (a) that the sum of £6,000 paid by the company to get rid of the warehouse was not money wholly and exclusively laid out or expended for the purpose of the trade within the meaning of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 3 (a), (b) that the expenditure of the sum of £6,000 was of a capital nature, and was not a proper debit item to be set against receipts in computing the profits for assessment, (c) that the case was indistinguishable in principle from that of *Cowcher v. Mills & Co., Ltd.* (4), and (d) that the deduction claimed should be disallowed.

G The decision of the special commissioners was as follows :

We hold that the company's claim to deduct £6,000 payable under a deed of surrender dated Oct. 25, 1932, for the surrender of the lease of the Canada Dock [the warehouse] fails on the authority of *Cowcher v. Mills & Co., Ltd.* (5).

H *Sir Patrick Hastings, K.C., J. H. Stamp and D. Knight Dix* for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondent.

MACNAGHTEN, J. : The facts relating to this matter are as follow. By an agreement made Apr. 18, 1901, the Lancashire and Yorkshire Railway Co.

leased to the appellant company a plot of land in Liverpool together with the warehouse to be erected by the railway company thereon. The lease was for 40 years, to commence from the letting of the contract for the erection of the warehouse, at the yearly rent of £200, and a further rent to be calculated at the rate of £5 10s. per cent. per annum on the amount for the time being expended in the erection of the warehouse. The appellant company agreed to use the premises for the purpose of a cold-storage warehouse and ice factory and for no other purpose, and not to assign or under-let. In 1932, when the lease had still 10 years to run, the appellant company desired its cancellation, because cold-storage business in Liverpool had decreased, and the appellant company had other premises in Liverpool adequate for their business in that city. Accordingly they entered into negotiations with the London, Midland and Scottish Railway Co., the successors of the Lancashire and Yorkshire Railway Co., for cancellation of the lease. The London, Midland and Scottish Railway Co. were willing that the lease should be cancelled, but they wanted to be paid for its cancellation, and the appellant company agreed to pay £6,000. Accordingly, a deed of surrender was made on Oct. 25, 1932, by which the lessors agreed to cancel the lease and to permit the surrender of the premises in consideration of the sum of £6,000 paid to them by the appellant company. The appellant company claims that the sum of £6,000 ought to be allowed as a deduction from their profits for the year 1933-1934.

By the Income Tax Act, 1918, Sched. D, Cases I and II, r. 3, it is provided as follows:

In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.

Money wholly and exclusively laid out and expended for the purposes of a trade may be deducted. The appellant company claim that this sum of £6,000 was expended wholly for the purposes of their trade, while, on the other hand, the Crown deny that it was so expended. The Crown say that it was paid by the company for the purpose of getting rid of an onerous lease of premises that the company did not want, and, further, that, even if it could be said to be money expended for the purposes of trade, it comes within r. 3 (f), which provides that no sum can be deducted in respect of

Any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation.

Numerous cases were cited on one side and on the other. For the appellant company, *Smith v. Incorporated Council of Law Reporting for England & Wales* (1) was cited. This was a case where it was held that the Council of Law Reporting were entitled to treat as a trading expense the gratuity of £1,500 which they paid to the late J. M. Moorsom, K.C., who was for many years the official reporter in the House of Lords. That

case came before SCRUTTON, J., who upheld the decision of the general commissioners for Lincoln's Inn, who had allowed this gratuity as a trading expense. Then there was *Mitchell v. Noble (B. W.), Ltd.* (2). In that case, ROWLATT, J., decided that the payment of £19,200 to a director—not, indeed, as a gratuity for his services, but to induce his retirement from the board—was allowable, in the circumstances of that case, as a trading expense. I do not think that those cases are of assistance in determining the case before me. Another case upon which reliance was placed, *Inland Revenue Comrs. v. Falkirk Iron Co., Ltd.* (3), is nearer the mark. In that case, the Falkirk Iron Co., Ltd., held some premises on lease at an annual rent for 10 years from June, 1927, with the right to break the lease at the end of 5 years. They used the premises for 2 years, but after that they were unable to use them, and the premises remained vacant, except for portions that they were able to let off to third parties, until the break in the lease at the end of the 5 years occurred, when the company put an end to the lease. For each of the 3 years during which the company had no use for the demised premises, they claimed as a deduction, in computing their profits for the purpose of income tax, an amount representing the difference between the rent paid under the lease and the rent received from the sub-tenants. The general commissioners on appeal allowed the deduction, and it was held by the First Division of the Court of Session in Scotland, before whom the case came in Scotland, that the commissioners were right. It was held that, although the company was not using the premises for the purposes of its business, nevertheless the rent that it paid for them, after deducting the moneys that it received from the sub-tenants, was, in the words of r. 3 (a), money “wholly expended for the purposes of the trade,” since the premises were acquired for use in the business of the company, and remained available for use throughout the whole of the 5 years of the lease.

For the Crown, reliance was placed upon *Cowcher v. Mills & Co., Ltd.* (4). In that case, Richard Mills and Co., Ltd., carried on the business of fishmongers at several places, including, until 1916, certain premises held upon a lease expiring in 1923. In 1916, the business at those premises was closed down, and the lessor agreed to accept a surrender of the lease in consideration of a sum to be paid by instalments of £250 per annum. The company issued a debenture to the lessor securing the instalments by a floating charge on all their assets. Instalments were paid regularly until 1921, when the lessor accepted a payment of £600 from the company in satisfaction of all further liability under the debenture. The general commissioners allowed the £600 to be deducted in computing the company's profits, but it was held by ROWLATT, J., that the payment of the £600 was not an admissible deduction. He pointed out that it was

... not a question as to what sum wise and prudent business men in the position of directors of the company would provide for before they arrived at the profits to divide among their shareholders.

The question was: "Is this an expense of the fishmongers' business which they are carrying on?" In his opinion, it was not, because they had gone out of business there.

The same judge delivered judgment to the same effect in *Mallett v. Staveley Coal & Iron Co., Ltd.* (5). In that case, payments were made for the cancellation of a lease of a coal mine. ROWLATT, J., said, at A p. 410:

The company do not make these payments in order to rid themselves of any annual charge against revenue in the future. They make them in order to get rid of the loss or apprehended loss in the business—an entirely different matter—after the income and the expenditure have been put together. In other words, they are paying this money in order *pro tanto* to go out of the business. They are not meeting in advance an annual demand in the business. B

The decision of ROWLATT, J., was affirmed by the Court of Appeal.

I think that I am bound by those cases, and that in view of them I must hold that the £6,000 paid for cancellation of the lease of Canada Dock which the appellant company no longer required for the purposes of their business was a disbursement not laid out for the purpose of carrying on the trade, but, as ROWLATT, J., put it, for the purpose of putting an end *pro tanto* to the trade, and, therefore, that the decision of the commissioners in this case was right. That being so, it is not necessary to consider whether, if the £6,000 could be said to have been expended for the purposes of the trade, it was a capital expense. In view, however, of the decisions in *Green v. Favourite Cinemas, Ltd.* (6) and *Eastmans, Ltd. v. Shaw* (7), my view would be that it was a capital payment, and not a revenue payment. I think, therefore, that this appeal fails. D E

Appeal dismissed with costs.

Solicitors: *Pinsent & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.] F

RANDALL v. RANDALL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), December 5, 6, 1938.] G

Divorce—Insanity—Duties of guardian ad litem—Receiver acting as such—Independent medical witness called by court—Test of unsoundness of mind—Matrimonial Causes Act, 1937 (c. 57), s. 3.

The respondent had been detained in pursuance of an order under the Lunacy Acts since May 16, 1932, being detained in single care in a licensed house. The defect of mind from which the respondent was suffering was a mere absence of will power. His state had improved during detention, but there remained, according to the medical evidence, an irreducible minimum of unsoundness of mind. Upon the presentation of the petition the receiver of the patient's estate was appointed guardian *ad litem*. The keeper of the licensed house, a layman, after a casual question to a local general practitioner, decided that the patient should H

not be informed of the petition. The court required an independent medical opinion as to the unsoundness of mind of the respondent :—

HELD : (i) although the case was a mild one, the court was satisfied that there was incurable unsoundness of mind, and, having reached that decision, the question of degree was not material.

(ii) it is undesirable that the receiver of the lunatic's estate should be appointed guardian *ad litem*. Such a person is generally not a suitable person to ensure that every proper and legitimate step for the patient's representation is taken. If no proper person is available, the Official Solicitor undertakes that function.

(iii) in a borderline case, where it appears possible that an order for the patient's discharge might have been made at a time within the statutory period, the court will require independent medical evidence.

(iv) a patient who is perfectly sensible in all intellectual matters ought to be informed of the petition against him.

[EDITORIAL NOTE. Apart from the question arising here as to whether there was unsoundness of mind within the Act in this borderline case, the judgment contains important statements upon the appointment and duties of the guardian *ad litem*, and upon the duty of the person in charge when called upon to decide whether the patient shall be informed of the petition. Where the court feels a doubt whether the patient has been properly detained during the whole of the statutory period of five years, independent medical evidence will be required.

AS TO DIVORCE FOR INSANITY, see HALSBURY, Supp., Divorce, para. 981.]

PETITION for divorce by wife under the Judicature Act, 1925, s. 176, as amended by the Matrimonial Causes Act, 1937, ss. 2; 3, on the ground that the husband was incurably of unsound mind, and had been continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition. By the Matrimonial Causes Act, 1937, s. 3, a person is deemed to be under care and treatment while he is detained in pursuance of any order under the Lunacy Acts, 1890 to 1930.

S. E. Karminski for the petitioner.

R. H. Bayford for the respondent.

SIR BOYD MERRIMAN, P. : In this case, the husband has been detained in pursuance of an order under the Lunacy Acts, 1890 to 1930, since May 16, 1932, and it is a fact of history which admits of no discussion that that detention under a reception order made on that date has lasted continuously for the 5 years immediately preceding the presentation of this petition—namely, Jan. 26, 1938. About that element of the proof which the wife is required to give there is no doubt whatever, but it was apparent in the very early stages of this case, which was first heard on July 19, 1938, that, so far as the question of unsoundness of mind was concerned, it was a very doubtful case. It was a case on the borderline, and, before that became clear, Mr. Bayford, who appeared for the guardian *ad litem*, was instructed to tell me, as he did immediately the case was called on, that he was not defending the case on merits.

This man is suffering from a defect of the mind which is, at present at any rate, manifested by, and consists of, an absence of will power.

He is perfectly sensible in all intellectual matters. He can talk perfectly sensibly. He can discuss subjects perfectly sensibly. He has got no delusions now of any sort or kind. What is alleged is that his volition is so defective as to amount to unsoundness of mind justifying his detention.

Most unfortunately, two things happened in connection with the presentation of this case which have caused me the very greatest anxiety. The first is that the receiver, a chartered accountant, who tells me—and I have no reason whatever to disbelieve him—that he is a very busy man in other ways, was appointed guardian *ad litem*, and, by his own account of the matter, has completely failed to realise that his duties as guardian *ad litem* are entirely separate from his duties as receiver. In fact, he has taken no sort of part in deciding whether this case should be defended. He has merely taken what he calls the instructions from the solicitors who were representing him as receiver. The other unfortunate thing was that it was decided under the rules that the husband should not be informed of the proceedings. The rules provide that a person in charge of a person of unsound mind—I am not quoting the exact words—may, on medical advice, decide not to inform the patient of the fact that a divorce petition has been presented against him. In this case, the person who took that decision is a layman in charge of a licensed house, where patients, including the husband, are received into single care. He is not a medical man, and he is not a lawyer, and he addressed what I understand was a careless, casual question to a local general practitioner as to whether this patient should be informed of what was going on in respect of the whole of the rest of his future life. Most unfortunately, as everybody agrees, this was an entirely wrong decision. A specialist who was called for the wife said that it was wrong, Dr. Bernard Hart, who was brought in at my instance, definitely said that it was wrong, and I think that it was a most deplorable decision, in the circumstances of this case. Manifestly, the rule was not intended to deal with a case like this, where a man is perfectly sensible in every respect, and can appreciate perfectly what is going on. It was intended to deal with circumstances far different, and the decision was a most unfortunate one. It has, of course, inevitably a repercussion upon the attitude of the guardian *ad litem*. He was excused from taking any instructions from the man whom he was representing, because *ex hypothesi* it was supposed to be impossible for him to give those instructions. At any rate, it was difficult, if not impossible, for the guardian *ad litem*, if he had been minded to do so, to take any part in consultation with the man principally concerned.

I want to say, so that there may be no mistake about it whatever, that a person who accepts the duties of guardian *ad litem* does not do so, as Mr. Cobley said that he did, as a matter of form. A guardian *ad litem* on behalf of an insane person or an infant represents that person before the court, and it is his duty to see that every proper and legitimate

step for that person's representation is taken. He has got to give his mind to it, and has got to decide for himself, upon the material put before him, what course of action to take. I agree that Mr. Cobley was handicapped, as I have already said, by the decision of the manager of the house where the husband was detained not to show the petition A to the husband, but, if anything, that made it more incumbent upon the guardian *ad litem* to satisfy himself affirmatively that no stone was left unturned to ensure that this man's case was fully put before the court in all its aspects.

I wish to say something in that connection about the advisability of B appointing receivers as guardians *ad litem*. The matter has come before me, not in reference to any particular case, but generally in connection with those patients who are in public institutions, and with regard to whom it is suggested that the accountant to the authority, or someone in a similar capacity, should act as guardian *ad litem*. I have made it quite C clear that the court would not approve of that suggestion. On the contrary, I think that I may now say that it is an established practice that, if no independent person, no person connected with the patient, is available in such circumstances to act as guardian, then the Official Solicitor himself undertakes that function. That has this vital effect. D There are, of course, most important questions to be decided as to the financial arrangements to be made by a petitioner on behalf of an insane spouse who is being divorced. In that aspect of the matter, of course, an accountant to a public authority, or a receiver in a private case, is as well qualified as anybody. No one could be better qualified. However, E before one gets to that point, there is the more important question whether the case is proved against the respondent, who is handicapped, of course, by the fact that he or she is in detention. Moreover, it is very desirable, and the practice is based upon the fact that it is very desirable, that the financial aspect of the matter should not necessarily be upper- F most when the guardian *ad litem* has got to take responsibility on the very important issue whether or not the insanity is proved. I think that I may say also that the administration and management department are taking a similar line with regard to the appointment of receivers as guardians *ad litem*. At any rate, so far as the court is concerned, it G may be taken that, whenever possible, a person independent of the mere receivership of the estate should be appointed guardian *ad litem* if such a person is available. This case has shown conclusively how necessary it is to keep the function of guardian *ad litem* and that of receiver completely distinct.

H In a borderline case of this description, particularly bearing in mind that the onus is upon the petitioner, it is also unfortunate that during the 5-years period nobody has examined this patient with the express point in mind whether it was necessary to continue the care and treatment on a compulsory basis, or, indeed, to continue it at all. It is true that as recently as 1934 Dr. Vosper, who was inspecting the place

where the husband was detained, did have a conversation with the husband on the subject of his being let out. Such a discussion undoubtedly occurred, but nothing further was done about it. Dr. Vosper himself told me that he did not think it would be desirable, at any rate, certainly not that he should be discharged altogether, but he said that he would have been prepared to consider the substitution of voluntary treatment under the Mental Treatment Act, 1930, for detention, provided suitable arrangements were made at his home for that purpose. A

Again, in 1936, Dr. Devas, one of the commissioners, in the course of his official duties reported to the Board of Control that he had had a long talk with the patient about his present mode of living and the possibilities of his returning to his home and work. Eventually the patient said that he would like to return, but added to that that he had better wait until the end of the summer, as then there would be less work to do, and he would have more time to get quite well. Dr. Devas added : B

I came to the conclusion that he was not really anxious to return home, and I did not consider he was in a fit state to manage his affairs . . . C

There again, however, the matter was never tested. The importance of it, of course, is this. Having regard to the evidence that Dr. Bernard Hart has given, it is quite clear that there might very easily have been a difference of opinion as to whether or not it was necessary to keep this man under any form of certification, at any rate by 1936. However, as I have already said, the matter never having been put to the test in that way, the statutory period has actually run out, and has become an established fact, and the only bearing on the hypothetical question as to whether or not it would have been continued if the matter had been put to the test is on the question of unsoundness of mind and its incurability, the burden of establishing which is upon the petitioner. D E

I was, naturally, so much disquieted by the circumstances to which I have alluded that at the first hearing I intimated that I must have an independent medical opinion. The result was that, on the recommendation of, as I understand it, and not on the direct appointment by, the Board of Control, two or three names were suggested, from which the parties could take their choice. Dr. Bernard Hart was selected, and I am quite satisfied, if I may say so, that no better selection could have been made. Dr. Hart has been of the greatest possible assistance to the court in this case. He has dealt with the matter with complete detachment, and, if I may say so, with great clarity, and I am most grateful to him for his assistance. The necessity for calling in Dr. Bernard Hart will be made even clearer when I say that, having made two examinations between the first hearing and the second hearing on July 29, one of which was on the night before the latter date—namely, July 28—Dr. Hart, as he has told me quite frankly, was really in a complete state of doubt himself as to what the truth of the matter was. He put it in a sentence, saying that, if he had been asked to certify on F G H

those two examinations in July, he would have refused to do so, but, equally, if he had been asked to release, he was in doubt whether he would not also have refused to do so. In any case, he said that he could not give me an opinion which would satisfy himself unless he could have further opportunity for investigation. That was so reasonable that I
A adjourned the case to this sitting in order that Dr. Hart should have a further opportunity of examining, and I have now had the benefit of his considered opinion as a result of those examinations.

Here let me say one word about the issue of unsoundness of mind. I am not going to lay down any test of the degree of unsoundness of
B mind necessary for the purposes of the Matrimonial Causes Act, because to do so would serve no useful purpose, and might create difficulties. In this case, however, Dr. Hart did indicate to me that he was testing the question of whether or not there was unsoundness of mind as a doctor would when giving the medical certificate which he is called upon to give
C at the time of the reception order—in other words, the certification by a medical practitioner—which is to the effect that the doctor has come to the conclusion that the patient is a person of unsound mind, or as the case may be (there are other words), and a proper person to be taken charge of and detained under care and treatment. Of course, it is quite plain
D that a patient cannot be certified in the first instance without a doctor or doctors being prepared to give that opinion, being the proper conclusion to be derived from the facts that they have observed themselves and the facts that they have ascertained. Though it is equally clear that the judge at the trial has to be satisfied that there has been a reception
E order based on such a certificate in the first instance, and that the care and treatment have continued thereunder, it is, I think, quite clear that the Matrimonial Causes Act, 1937, recognises that the unsoundness of mind may be present notwithstanding that the initial detention under the reception order has not been continuous, for by sect. 3 (b) it is
F provided that the spouse shall be deemed to be under care and treatment while he or she is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of such detention as aforesaid, the detention as aforesaid being, of course, detention in pursuance, *inter alia*, of a recep-
G tion order under the Lunacy Acts. I cannot think, therefore, that it would be right to say that the court must be satisfied at the time of the hearing that the unsoundness of mind is such as must at that moment lead to a fresh certification. After all, the whole object of care and treatment is the improvement of the patient's mental condition, and nobody can
H dispute, and nobody does dispute, that, at the time of the original certification, this husband was unquestionably of unsound mind. I am not going to refer in detail to the certificate given at the time, because there is no dispute about it. He himself has admitted to everybody with whom he discussed this matter, in a perfectly sensible way, that, at the time he was certified, he was undoubtedly suffering from a very

definite derangement of mind. Equally, however, it is unquestionable in this case that the care and treatment which he has received continuously at Mr. Heywood's home—and it is all the more credit to Mr. Heywood that it is so—have had a most beneficial effect, and have got him into a state in which, to put it at its very lowest, it is at least doubtful whether any responsible medical officer would certify him afresh at this time. Nevertheless, it does not follow from that that he is not of unsound mind within the meaning of the Matrimonial Causes Act. Otherwise this provision that the care and treatment for 5 years continuously need not necessarily involve detention for the whole period of 5 years, but may involve merely treatment as a voluntary patient—provided it is continuous on detention—would be quite meaningless. A B

It remains, therefore, to consider what is the real effect of Dr. Hart's evidence. I am bound to say, and I say it without any disrespect whatever to those who gave evidence earlier, that I must necessarily pay more attention to Dr. Hart's evidence, because he is the only man who has examined this patient in the light of this divorce suit. I do not mean that he is the only man who has examined this patient in the course of the divorce suit, or in anticipation of the divorce suit. Dr. Risien Russell, I am fully aware, examined him on the eve of the petition. Dr. Sotheran, I am fully aware, examined him after the petition had been filed, with a view to considering the question of defence. None of these doctors, however, examined a man who knew that there was a petition for divorce on the ground of insanity against him. Dr. Hart was the only one who had that advantage. Indeed, it was Dr. Hart himself who, quite rightly, in my opinion, before the last hearing, took the responsibility of telling the patient that there was, in fact, a divorce suit pending, though he did not, in fact, tell him that it had already come on, and that evidence had been given. For that reason, as I have already said, I have been greatly impressed by Dr. Hart's candour and clarity in giving his evidence, and I am giving the decision that I am about to give on his evidence. C D E F

He has satisfied me that the very minimum of care and treatment required in the case of this patient would be care and treatment as a voluntary patient, and that that is the least which, so far as he can judge from what he has seen now, and assuming, as I am prepared to assume, that the man is now in a better condition than that in which he was even during the latter part of the 5 years, would have satisfied him at any time since the man's condition began to improve. Without going through his evidence in detail, he says that he is quite certain that, whatever form of care and treatment is adopted in the future, whether it is voluntary or whether it is by detention, the man is of unsound mind. In another part of his evidence, he said that small improvements are always possible, but that the condition is irrecoverable. The acute condition which existed formerly has disappeared, but there is an irreducible minimum of unsoundness of mind manifesting itself, as I have already said, by this G H

absence of volition, of which every doctor who has examined him, and Mr. Heywood, who is in charge of him, has spoken. He said in terms that, such as this defect is, there is no doubt whatever that it is incurable. He used a metaphor to the effect that the original breakdown had caused scars, not in the literal sense, but figuratively, and that, though the symptoms had disappeared, and the condition generally had improved, that scarring of the mental condition must necessarily remain for all time. That is what he means by saying that there is an irreducible minimum of unsoundness of mind.

He satisfied me that he would be very reluctant to allow the patient to go out as a voluntary patient unless he personally was satisfied with the conditions under which that arrangement was made, and that, if it was desirable to allow him to live in the way that he sometimes expressed a desire to live—namely, with a small cottage and a small garden—the proper way to give effect to that would be to change the single care order from his present place to any such cottage. Then, of course, he would still, within the meaning of the Act, be under the detention of a reception order, and in single care, as at present.

In spite of the doubts and hesitations which naturally have affected me, having regard to the way in which this case came before me, I am satisfied that the burden of proof is discharged, and that, though this man is a mild case, he is of unsound mind, and that that unsoundness of mind is incurable. Once one has arrived at that decision—that there is unsoundness of mind, and that it is incurable within the meaning of the Acts—I am not concerned with the question of degree at all, except in so far as that is tested by the statutory test that there has been care and detention for the requisite period. That being so, I pronounce a decree *nisi*.

Decree nisi. No order as to costs.

Solicitors: *Taylor, Willcocks & Co.* (for the petitioner); *Field, Roscoe & Co.* (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

Re VAUX, NICHOLSON v. VAUX (NO. 2).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
December 5, 6, 1938.]

Wills—Double portions—Ademption—Pecuniary legacy and interest under discretionary trust in will—Settlement of shares in private company—Nature of portion.

The testator by his will gave the income of his residuary estate unto his widow until death or remarriage, and after her remarriage he gave her an annuity of £500 per annum. Subject thereto, the trustees were to set aside £20,000 for each of his daughters living at his death or born in due time thereafter, and these sums were settled in the usual way. The trustees were then given full discretion to deal with the capital and income of the residue in favour of the children

and issue of deceased children. The will continued: "And I declare that my trustees may from time to time within the period of 21 years from my decease accumulate the surplus of any income of my residuary trust fund not paid or applied under the preceding clause of this my will by investing the same and the resulting income thereof to the intent that the accumulations shall be added to the residuary trust fund and follow the determination thereof with liberty nevertheless for the trustees at any time or times to resort to the accumulations of any preceding year or years and apply the same as part of my residuary trust fund." This clause was admittedly void for perpetuity, but it was contended that that result was prevented by the following clause, which, it was contended, must be read with its preceding clause. The following clause was in these terms: "Having the fullest confidence in my trustees I hereby authorise and empower them to deal with the capital and income of my residuary trust fund and pay away and deal with the same in all respects for the benefit and provisions of my children or grandchildren as they may think best or most expedient and to act in all respects as I could have done if living save only that all such dealings with the residuary trust fund and the income and accumulations thereof shall be within the limitations prescribed by law." The testator then expressed his views as to the distribution of the residue, which were that it should go to his sons and their children, but so that no capital moneys should be paid to any son until he reached the age of 30 years. The Court of Appeal had previously held that, although the one clause was void, as admitted, by reason of the rule against perpetuities, yet, under the second clause, the trustees for the time being of the will had conferred upon them a power to appoint such interests in favour of children and grandchildren of the testator as, if created by the testator's will, would necessarily have vested, if at all, not later than 21 years after the expiration of some life in being at the testator's death. The testator later made a settlement of 8,000 preference shares of £5 each in a private company upon his four children, each child having 2,000 shares settled upon him or her with cross-remainders. The testator died in Nov., 1925, and left two sons and two daughters him surviving:—

Held: the share under the will of any one child being dependent upon the exercise of the discretion given to the trustees, the testator had not himself finally decided the share of his estate each child should have, and the benefits under the will were not, therefore, portions. The nature of the terms of the will, coupled, if necessary, with that of the terms of the settlement, was such that the presumption that the testator did not intend to confer double portions was rebutted, and, in the result, the settlement did not operate as an ademption of all, or any, of the benefits conferred by the will.

Decision of SIMONDS, J. ([1938] 2 All E.R. 177, reversed.

[EDITORIAL NOTE.] The appeal in this case has dealt with two points quite separately. The perpetuity point was decided and reported at p. 297 *ante*. The present judgments deal with the question of double portions. The result of these decisions is that the third point argued below as to the effect of a partial intestacy does not now arise. The consideration of the effect of a discretionary trust in relation to the rule against double portions is of considerable importance by reason of the fact that discretionary trusts are now so generally used for the avoidance of the consequences of insolvency and as an alternative to the restraint upon anticipation clause recently rendered inoperative by statute. The discretionary trust in the present case was very wide in its terms—so wide in fact that it was contended with some confidence that the will was void as being too vague by reason of the fact that the testator had left the whole disposition of his property to his trustees. The application of the decision to the more usual form of discretionary trust will, therefore, require some care, but the principles are so clearly and adequately stated that no great difficulty should arise.

AS TO DOUBLE PORTIONS see HALSBURY, Hailsham Edn., Vol. 13, pp. 163-178, paras. 148-163 ; and FOR CASES, see DIGEST, Vol. 20, pp. 454-466, Nos. 1774-1928.]

Cases referred to :

- (1) *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482 ; 20 Digest 453, 1770 ; 60 L.J.Ch. 403 ; 64 L.T. 429.
- (2) *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1 ; 20 Digest 459, 1840 ; 72 L.J.Ch. 20 ; 87 L.T. 574.
- (3) *Ex p. Pye, Ex p. Dubost* (1811), 18 Ves. 140 ; 20 Digest 463, 1886.
- (4) *Pym v. Lockyer* (1841), 5 My. & Cr. 29 ; 20 Digest 453, 1769 ; 10 L.J.Ch. 153.

CROSS-APPEAL from an order of SIMONDS, J., dated Mar. 15, 1938, and reported [1938] 2 All E.R. 177. The appellants were the daughters of the testator, and it was contended on their behalf that, in ascertaining the ultimate residue of the testator's estate and the shares therein of his children, the legacies of £20,000 each settled by the testator's will upon his daughters were not to be treated as adeemed to the extent of the value of the shares settled upon each daughter respectively by a settlement made by the testator in his lifetime.

H. O. Danckwerts for the plaintiff.

J. Norman Daynes, K.C., and *E. M. Winterbotham* for the first defendant, the widow of the testator.

Alexander Grant, K.C., and *J. Leonard Stone* for the second and third defendants, the two daughters.

H. A. H. Christie, K.C., and *J. G. Strangman* for the last defendant, the surviving son.

Grant, K.C. : The will is in an unusual form. An absolute gift is not made to any of the children, but there is a gift to them on trust, with a proviso that, in the event of the trust in respect of one of the children not being fulfilled, his share should pass to the other three. The settlement made after the will does not make an advancement to any child as against the others, but it is a simultaneous gift to all the children. The first requisite of the rule against double portions—namely, that there must be an advancement in favour of a particular child—does not exist in the present case. The rule begins by there being a gift to certain individuals of a class who take under the will either by way of legacy or by way of residuary gift. The law says that those who have received the gifts must not deprive their co-beneficiaries of their shares by getting the interest given to them during the testator's lifetime. The rule is stated best in *Re Lacon, Lacon v. Lacon* (1). The present case is one which does not come within the doctrine at all. When the testator made his will, he made it on the footing that he was dealing with his residuary trust fund. When he came to make the gift in 1924, he was not making to each of his children an advancement which each would have to bring into account. The gift of 1924 is not a gift of a portion, but a settlement of a sum of money on all the children. It is not a gift within the meaning of the double portions rule, as that rule applies only in cases where inequality has been produced.

Stone : The rule against double portions can never apply when the gift, after the will has been made, is an equal gift to all the children, as it is in the present case : *Re Scott, Langton v. Scott* (2). The rule owes its origin to the idea that, when a parent makes a provision for his child, he is paying a debt of nature, and there is a presumption against an intention to pay twice : *Ex p. Pye, Ex p. Dubost* (3). Where, as in A the present case, the same sum is settled in equal shares on each of the children, the presumption is rebutted.

Christie, K.C. : This is a case where one is dealing with the ademption of a pecuniary legacy, and not with the case of ademption as between residuary legatees. The doctrine was applied regularly for B many years as between children. The foundation of the doctrine was not equality between residuary legatees. It was based on the supposed moral duty of a parent to his children : *Ex p. Pye, Ex p. Dubost* (3). The observations of LORD ELDON, L.C., in that case were considered by LORD COTTENHAM, L.C., in *Pym v. Lockyer* (4), and it was held in that C case that ademption operated only *pro tanto*. The testator had made up his mind what he wished to do, and that was the principle applied by SIMONDS, J., in the present case. It is not a question, in the present case, of dividing the estate into *aliquot* parts. The minimum sum that each daughter should have is that of £20,000. If it came to a question D of bringing in anything against that which was appointed by the trustees, it could not be done. The testator has made this definite provision by settlement for each daughter, irrespective of anything which he has done by his will. It is still open to the trustees to exercise their discretion as to whether they will participate in the residue. In *Re Scott, E Langton v. Scott* (2), the testator bequeathed unequal shares in his residuary estate to his children, and made equal advances to them in his lifetime. In the present case, the intention of the testator was that each daughter was to have £20,000, and it was his intention that the residue should go to his sons, with a possibility of the daughters also F getting something from it. If the trustees are so minded, they can give the daughters some further benefit. So far as his sons are concerned, the testator evidently intended that his sons should have the residuary estate.

Daynes, K.C. : SIMONDS, J., satisfied himself that the legacies were G portions. He also satisfied himself that the shares settled on the four children were portions, and he held that the rule against double portions applied. The legacies are portions, and any additional benefits that the daughters may take under the will by the exercise by the trustees of their powers will not be portions. What the sons may take under the H trusts of the residue will be portions. Cl. 14 of the will contains words which conclude the matter. The settlement made *inter vivos* contains an accruer clause, and it is upon that clause that I rely. The word "portion" is used to indicate a provision for a child rather than an *aliquot* part of the estate.

SIR WILFRID GREENE, M.R. : This is an appeal from a judgment of SIMONDS, J., upon an originating summons, and the question with which we now have to deal is a question of double portions. In a previous judgment upon an appeal from another part of the decision of SIMONDS, J., we reversed the order that he made, whereby, in construing the will of

- A the testator, he held that the provisions in cl. 11 and 12 of the will, where the testator deals with his residuary estate, were void for perpetuity. This court held that, although the provisions in cl. 11 were void, cl. 12 conferred a valid power upon the trustees for the time being of the will to create any such interests in favour of children and grandchildren
- B of the testator as, if created by the testator's will, would necessarily have vested, if at all, not later than 21 years after the expiration of some life in being at the testator's death.

The present question arises in this way. Under his will, dated Nov. 27, 1919, the testator bequeathed two legacies out of his residue to trustees

- C upon trust for his two daughters. The trusts declared were trusts in favour of the daughters for life and after their death for their children and remoter issue as they should appoint, and in default of appointment to the children of the daughters attaining the age of 21. If no child attained the age of 21, the legacy of £20,000 was to fall into residue.
- D Subject to these legacies, the trusts of the residuary trust fund are those which we have already declared in our previous judgment. That is to say, the trustees have a power to appoint for the benefit of children or grandchildren of the testator, subject to the appointment not offending against the rule against perpetuities. The testator had four children,
- E two sons and two daughters. One son is dead. The other son and the two daughters are still alive, but none of them has children. The power which we have held the trustees to possess under cl. 12 has not been exercised.

The question of double portions arises in these circumstances. The

F will, as I have said, was dated Nov. 27, 1919. On Nov. 9, 1924, the testator executed a voluntary settlement. By that document he declared certain trusts of 8,000 6 per cent. preference shares of £5 each in a private company, Messrs. C. Vaux & Sons, Ltd., which he had transferred to trustees. The trusts were to divide those shares into four

- G equal parts, and to hold one of such parts upon certain trusts under which his son Ernest was interested, another part upon similar trusts in which his son Peter was interested, and the other two-fourths upon trusts in which his daughters respectively were interested. The trust in favour of Ernest and the corresponding trust in favour of Peter were discretionary
- H trusts until those children should attain the age of 30 years, and, on their attaining the age of 30 years, the income was to be paid to the son during the life of the settlor, and after the death of the settlor the capital went to the son, with a power to appoint, in certain circumstances, to a surviving wife or to any children in the case where a son died under 30 years of age. I need not give more details of those trusts. In the

case of the daughters, there was a discretionary power to provide income for maintenance during their minority. Upon their attaining their majority, they were to have the income for life, with power to appoint an annual sum to a surviving husband, and, after their death, for the children of the daughters as they should appoint, and, in default, for the children attaining the age of 21 equally. There was a cross-gift under which, in the event of the decease of any child of the settlor without leaving any child or children who should attain a vested interest in the share of such child settled in his or her favour, the share of such deceased child was to accrue to the other or others of the settlor's children, and to be held upon the trusts of their original shares. A

The testator died on Nov. 25, 1925. It is said on behalf of the surviving son and the widow that the rule against double portions applies in relation to the £20,000 legacies in favour of the daughters given by the will and the benefits which they took under the settlement of Dec. 9, 1924. B

The way in which the matter proceeded before SIMONDS, J., was this. He dealt, first of all, with the question as to whether or not those two legacies, and the shares which were settled under the settlement were portions. He then dealt with the question whether or not the residuary gift infringed the rule against perpetuities, and, as I have said, he held that it did so, with the result that there was a partial intestacy, the testator dying intestate as to the residue of his estate. On that matter, the judge reserved his judgment, and, after he delivered it, the question was argued whether the rule against double portions applied to the case of a partial intestacy, and, further, whether it applied for the benefit of the widow or only for the benefit of the children. The judge held that the rule applied to the present case, notwithstanding that it was a case of partial intestacy, but that it did not apply for the benefit of the widow. The only matter that has been argued before us is the question whether the rule applies at all. If we had come to the conclusion that it did apply, the two further questions would have arisen in respect of each of which the parties interested appeal—namely, whether it applies in the case of a partial intestacy, as may be the case under the will, and whether the widow can be benefited by it. I say that there may be a case of partial intestacy for the reason that, if the trustees do not exercise the power of appointment which we have held that they possess—and I must not be taken as expressing a final opinion upon this point, which has not been argued—there will presumably be an intestacy. However, having regard to the conclusion to which we have come upon the initial question as to whether or not the rule against double portions comes into operation in this case, it is not necessary to hear argument upon those matters. C D E F G H

The rule against double portions rests upon two hypotheses—(i) that under the will the testator has provided a portion, and (ii) that by the gift *inter vivos*, which is said to operate in ademption of that portion either wholly or *pro tanto*, he has again conferred a portion. The con-

ception is that, the testator having in his will given to his children that portion of the estate which he decides to give to them, when, after making his will, he confers upon a child a gift of such a nature as to amount to a portion, then he is not to be presumed to have intended that that child should have both, the gift *inter vivos* being taken as being on account of the portion given by the will. When the word "portion" is used in reference to the gift *inter vivos*, it has a qualitative significance, in the sense that it is not every gift *inter vivos* that will cause the rule to come into operation. If a testator gives to a child as pure bounty, and by way merely of a present, a sum of money, that will not have such a character as to cause the rule to come into operation. Similarly, there may be various reasons why the testator should give property to a child. He may wish to free him from some embarrassment, or something of that kind. In cases of that sort, upon the facts, a gift may not be a portion at all, in which case, of course, the rule does not apply. In the present case, the judge has held that the gifts to the daughters under the will and the gifts to them under the settlement were equally in their nature portions. It is to be observed that the gift under the will is not in the form of a definite and final apportionment of the estate among the children, because, as we have held, and, indeed, as the testator intended, according to the language that he used without reference to the rule against perpetuities, the power of deciding how much of his estate should go to each child was vested by him in his trustees. The daughters get, as a minimum, settled legacies of £20,000 each. Subject to that, the trustees are empowered to distribute the residuary estate among the four children in whatever manner and whatever shares they think proper. They could, accordingly, give the whole to one daughter or to one son, or they could divide the whole among the two daughters, or among the two sons, or among any three, or the whole four of the children in whatever proportions they thought right. Accordingly, the case is not one where the testator has himself finally decided what share of his estate each child is to have. The importance of that consideration will appear later, but I am not prepared to say that, for the purpose of the first hypothesis—namely, that the will must provide portions—the present will does not so provide. He makes provision for dividing up his estate, and the fact that this is to be done by the trustees, and not by himself, does not, I think, mean that the benefits which the children may ultimately get are not to be treated as portions.

When I turn to the settlement, different considerations may well apply. The judge held that, under the settlement, the benefits conferred were portions. I say different considerations may apply for the reason that the benefits conferred by the settlement, on the face of the document, were benefits conferred upon all the children in equal amounts. The trusts are not the same, but substantially each child obtains a benefit in an equal amount of shares, and there are the cross-gifts to which I have referred. However, it is not necessary to investigate that question

further, because I am prepared to assume, for the purposes of this judgment, that the true nature of the provision made by that settlement was that the benefits conferred were portions. I will assume, therefore, that the two hypotheses upon which the application of the rule rests are satisfied in the present case. That, however, is only the beginning of the inquiry, because, although, when those two hypotheses are satisfied, A there is a presumption against double portions, that presumption can be rebutted if, upon consideration of all the circumstances of the case, the intention to satisfy the portion in the will by means of the portion given *inter vivos* is negated. In that inquiry, various matters of evidence can be looked at, and, of course, what is particularly important, B the very nature of the two provisions themselves has to be examined. In the present case, in order to ascertain what intention has to be ascribed to this testator, we must examine the situation as it existed at the date when the settlement was executed, because it is at that date that he is presumed to form that intention against double portions which brings C the rule into operation. At that date, the testator had made a will, under which, as I have said, he had not himself decided finally upon the shares of the estate which each child was to have. He had left it to his trustees so to arrange the disposition of his residue that, although they could not diminish the interests of the daughters under the will D below the £20,000, they were at liberty to increase this by as much as, in the exercise of their discretion, they thought fit. Accordingly, he must be taken to have contemplated that the trustees might, in the exercise of their discretion, confer upon the daughters a much larger interest, or might have appointed the entirety of the residue to one E daughter, as I have said.

I should here refer to an argument which was addressed to us by Mr. Daynes as to what, under the will, was to be regarded as a portion. He argued that, in the case of the daughters, the only benefaction which could properly be described as a portion was the gift of the £20,000 F settled legacy, and that such interest, if any, as they might take under a distribution by the trustees ought not to be regarded as their portion, or part of their portion. On the other hand, in the case of the sons, he admitted, and I think was constrained to admit, that anything that they might take under a distribution by the trustees would be a portion. G The reason why he drew that distinction was that in certain provisions of the will, which are of a purely precatory nature, the testator expresses his view as to what properly ought to be done, in the sense that he expects and hopes that his residue will be appointed to his sons. That does not alter the legal position at all, because the trustees undoubtedly H have power to cut out both, or either, of the sons and to give the whole to the daughters. I myself am unable to regard the share, if any, of residue which a daughter gets as in any different position in this respect from that of the share, if any, of residue which a son may get. If what a son gets is a portion, then, in my view, what a daughter gets ultimately

must also be regarded as a portion. As will be seen later, even if that view be wrong, my conclusion on the question before us will be the same.

- The testator, having in mind the provisions of his will, and knowing the powers which he has conferred upon his trustees, on Dec. 9, 1924, vests in the trustees of the settlement shares which, if he had not so vested them, and if he had died without parting with them, would have formed part of the residue of his estate. There are two things to notice about that disposition. The first is that all four children benefit under it. The other is that there is, as I have said, a cross-gift among the children. It was those circumstances which made me say in an earlier part of this judgment that other considerations might well apply to this document in dealing with the question whether or not the benefits conferred are truly in the nature of portions. However, assuming that they are, it is, nevertheless, important to bear in mind those two circumstances when one comes to see whether the presumption against double portions is rebutted. The crucial fact, to my mind, lies in this. In the ordinary simple case of double portions, the testator has made a definite provision in his will, and a definite provision for a child *inter vivos*. In such a case, no difficulty arises, but in the present case the testator has not made any such definite provision in his will, and he has left it to his trustees (as I have said more than once) to distribute the residue of his estate. The daughters' legacies are *minima*, and not *maxima*. In those circumstances, is it possible to impute to this testator an intention that the £20,000 legacies shall be *pro tanto* adeemed? In my opinion, it is not possible to impute such an intention, and the circumstances and nature of the gift are such as to rebut any presumption which otherwise would arise. The matter may, I think, be tested in this way. I will take certain figures in order to test the position. The shares, I may assume, were worth par, which would make each child's block of shares under the settlement worth £10,000. Each daughter gets, under the will, a legacy of £20,000. Suppose the trustees, in exercise of their discretion under the will, give the entirety to the sons. According to the argument, the daughters' legacies will be adeemed to the extent of £10,000 by the operation of the will. However, supposing the trustees in the exercise of their power give £20,000 to each daughter. The position will then be that the legacy will be adeemed to the extent of £10,000, but the appointment of the £20,000 will not be affected, because, according to the argument, that is not a portion. The circumstance, therefore, that the trustees, although they cannot reduce the daughters' interest below the minimum of £20,000, can add to it in any way they please appears to me to indicate that the testator was quite clearly intending that the distribution of his estate should be in the hands of his trustees, and that the rule should not operate.

I have said that, even if the argument was well-founded that any sum appointed to the daughters should not be treated as part of their

portion, the same result would follow. My reason for so saying may be explained quite shortly. Let me assume that the argument is right. The position would be that any sum appointed to a son was his portion. If the rule against double portions applies as against the daughters, it must apply equally as against the sons, and each son must be treated as having received, under the settlement, an advance of £10,000 against A his portion under the will. Now let me suppose that the trustees, in exercise of their power of appointment, appoint £10,000 out of residue to a son. The effect of that will be, upon the argument put before us, that that appointment will be entirely inoperative, because it would then be said against the appointee that he had already received £10,000 in B respect of his portion by reason of the interest conferred upon him by the settlement, and that he could not receive that £10,000 again under the appointment. Similarly, if the appointment by the trustees was not £10,000, but £20,000, the appointment would be inoperative to the extent of £10,000. First of all, no authority has been cited to us in which C the rule against double portions has been held to operate in a case where there is in the will a special power of appointment among the children. It seems to me that in the present case the rule cannot possibly operate, because it would have the effect of cutting down the trustees' power of appointment in the way that I have mentioned. In other words, the D testator, having in his will committed the distribution of his residuary estate to the discretion of his trustees, by act *inter vivos* must be taken to have intended *pro tanto* to cut down the operation of that power. Not only is there no authority in support of such a proposition, but it seems to me to be contrary to the whole theory on which the rule against E double portions rests. Proceeding, therefore, still upon the hypothesis that Mr. Daynes is right in saying that the daughters' portions consist of the £20,000 legacies only, I note that the rule against double portions cannot, if I am right in what I have just said, operate as against the sons, and in such a case as the example I have taken, in my judgment, F the son would be entitled to claim, not merely the £10,000 given to him by the settlement, but also the £10,000 appointed to him by the trustees. If the rule against double portions cannot apply in the case of the sons, in my judgment, it cannot apply in the case of the daughters, even assuming the correctness of Mr. Daynes' suggestion. The rule against G double portions is one intended to provide as between the children for the presumed intention of the testator, and it seems to me quite impossible to presume that this testator was intending that, in the case of the daughters, the power of appointment in the trustees was to be effective, and, in the case of the sons, it was not. Putting it in another way, the H testator cannot have intended that the daughters' legacies should be subject to the rule, and that any sum appointed to the sons should not. There must be uniformity of treatment of all the children, and it is impossible to suppose that the testator intended anything else. Therefore, upon either view as to the true effect of the will, and as to what are

truly portions, my opinion is that the very nature of the provisions in the will, coupled, if necessary, with the nature of the provisions in the settlement, is sufficient in the present case to rebut the presumption that the testator did not intend to confer double portions. The considerations which I have set out in the course of this judgment are

A considerations which I do not think can have been brought clearly before the mind of the judge, because in his judgment he does not deal with these aspects of the matter. In my opinion, the appeal succeeds, and an appropriate declaration, the actual form of which can be discussed later, should be made in that sense.

B SCOTT, L.J. : I agree.

CLAUSON, L.J. : I agree. This is a very peculiar and exceptional case, and depends purely upon the facts, and upon the very peculiar provisions made for his family by the testator in his will and in the

C 1924 settlement. The decisive factor in the case seems to me to be that the settlement in 1924 appears with reasonable plainness not to be intended as an advancement of the gifts given by the will. It is merely a part of the settlement of his estate equally among his children, and has no reference, and cannot be treated as having any implied reference,

D to the benefits conferred by the will upon the beneficiaries under the settlement. The presumption of an intention to advance a child by the settlement in respect of, or on account of, the provisions made by the will appears to me, on the facts, and especially in view of the character of the 1924 settlement, to be satisfactorily rebutted.

E *Appeal allowed. Declaration that the settlement did not operate as an ademption of all or any of the benefits conferred by the will. Leave to appeal.*

Solicitors : Patersons, Snow & Co., agents for Ranson & Co., Sunderland (for all parties).

F [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

PYRMONT, LTD. v. SCHOTT.

G [PRIVY COUNCIL (Lord Atkin, Lord Porter and Sir Lancelot Sanderson),
October 18, 20, 21, December 1, 1938.]

Privy Council—Gibraltar—Money—Currency in which debt payable—Loan in Gibraltar in pesetas—Subsequent restriction by Spanish government on export of currency—Currency in which loan repayable.

H The Spanish peseta coinage was legal tender in Gibraltar before and up to 1898, when, by an order in council dated Aug. 9, 1898, sterling money of Great Britain became the only legal tender, subject to certain exceptions not here material. Nevertheless, pesetas were in frequent use, and were regularly given and taken as payment in commercial transactions in Gibraltar. The peseta was, and remains, the unit of Spanish currency. Up to Mar., 1936, peseta notes were commonly given and accepted, both in Spain and in Gibraltar, as the equivalent in value

of the coinage they represented. By a Spanish decree of 1930, the export of silver from Spain was prohibited, and on Mar. 16, 1936, travellers from Spain were prohibited from exporting any notes of the Bank of Spain unless accompanied by an authorisation called a *guia*. These *guias* were issued by the customs authorities, and, after the date of the decree, it became illegal for notes to be reintroduced into Spain unless accompanied by *guias* corresponding in amount to the pesetas proposed to be brought in. Since the notes for which *guias* were supplied could be remitted to Spain, and there exchanged for metal of their nominal amount, they had a higher value than notes without *guias*. In May, 1935, the appellants, a company incorporated in Gibraltar and carrying on business as an investment company, borrowed in Gibraltar from the respondent 500,000 pesetas then standing to her credit at Barclays Bank there. The bank dealt only in pesetas accompanied by *guias*, and the loan was made by a cheque drawn on the bank. The loan was repayable in May, 1936, when the appellants offered repayment by means of a cheque for 500,000 pesetas on the Credit Foncier, which would not have supplied *guias* with the notes. This offer was refused, as was finally a tender of a bundle of 500,000 peseta notes without *guias*. The appellants maintained that pesetas meant peseta notes, and that that was all they were obliged to return. The respondent contended that the contract was for the supply of pesetas, and that the obligation was one for their return :—

HELD : (i) the contract, upon its proper construction, was one for the supply of a commodity—namely, pesetas.

(ii) the word “ peseta ” meant the unit of account in the currency of Spain.

(iii) the contract was not fulfilled by the tender of 500,000 peseta notes, as such were not units of account of the Spanish Republic.

[EDITORIAL NOTE.] This case is of twofold importance. In the first place, it is the first occasion upon which the English courts have considered the effect of the restrictions now placed upon the export of currency by many European countries. In the second place, the judgment of RUSSELL, J., in *British Bank for Foreign Trade, Ltd. v. Russian Commercial & Industrial Bank* (2) is considered and a passage that has given some little difficulty is considered and explained.

AS TO CURRENCY IN WHICH DEBT IS PAYABLE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 173, 174, para. 251 ; and FOR CASES, see DIGEST, Vol. 35, pp. 169-176, Nos. 13-63.]

Cases referred to :

- (1) *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466 ; 35 Digest 169, 12 ; 93 L.J.Ch. 263 ; 130 L.T. 109.
- (2) *British Bank for Foreign Trade, Ltd. v. Russian Commercial & Industrial Bank* (1921), 38 T.L.R. 65 ; 35 Digest 170, 17.
- (3) *Cuming v. Monro* (1792), 5 Term Rep. 87.
- (4) *Celia (S.S.) v. Volturno (S.S.)*, [1921] 2 A.C. 544 ; 35 Digest 174, 39 ; 90 L.J.P. 385 ; 126 L.T. 1.
- (5) *Pollard v. Herries* (1803), 3 Bos. & P. 335 ; 6 Digest 336, 2234.
- (6) *Suse v. Pompe* (1860), 8 C.B.N.S. 538 ; 35 Digest 173, 37 ; 30 L.J.C.P. 75 ; 3 L.T. 17.
- (7) *Cohn v. Boulken* (1920), 36 T.L.R. 767 ; 35 Digest 174, 45.
- (8) *Anderson v. Equitable Assurance Society of United States* (1926), 134 L.T. 557 ; 35 Digest 176, 62.
- (9) *Auckland Corp'n. v. Alliance Assurance Co., Ltd.*, [1937] A.C. 587 ; [1937] 1 All E.R. 645 ; Digest Supp. ; 106 L.J.P.C. 40 ; 156 L.T. 367.
- (10) *Ottoman Bank of Nicosia v. Chakarian*, [1938] A.C. 260 ; [1937] 4 All E.R. 570 ; Digest Supp. ; 107 L.J.P.C. 15 ; 153 L.T. 1.

(11) *Burgess v. Diaz* (1937), Unreported (Mixed Tribunal of Tangier, Peace Section), Jan. 28.

APPEAL from a judgment of the Supreme Court of Gibraltar (SIR KENNETH JAMES BEATTY, C.J.), dated Apr. 9, 1937, whereby the appellants were ordered to pay to the respondent the sum of £13,969 19s. 10d. and costs. The facts of the case are fully set out in the judgment of their Lordships delivered by LORD PORTER.

H. U. Willink, K.C., and John Lawrence for the appellants.

H. I. P. Hallett, K.C., and Stephen Chapman for the respondent.

- B** *Willink, K.C.*: The obligation of the appellants with regard to the capital sum lent was to repay the same in Spanish peseta notes. This they duly tendered before action brought, on June 19 and again on Oct. 16, 1936. The appellants were not bound to provide the respondent with *guias* in addition to 500,000 pesetas in Spanish bank notes. This is
- C** a written contract for the delivery of a foreign currency and its return, the currency consisting of those physical objects in which the sovereign state, to which the currency belongs, permits its units of account to take physical form. The pesetas here could not have been anything else than (i) a cheque on a proper bank for pesetas, giving the same results as
- D** the cheque of 1935, or (ii) peseta notes themselves.

- Hallett, K.C.*: There is no evidence that the respondent had 500,000 pesetas in notes. What the appellants got were pesetas which were transferred to their account from that of the respondent, and the obligation here is one to hand back to the respondent 500,000 pesetas. Where
- E** there is a contract to deliver something expressed in a foreign unit of account, that foreign unit of account connotes a means of payment, which is that which would be legal tender in respect of that foreign unit of account in the country to which it belongs. You cannot have a unit of account, pesetas, connoting anything but a Spanish means of pay-
- F** ment. The proper method of discharge is that the means of discharge should be legal tender in the country to which the foreign unit of account belongs. Ultimately, foreign means of discharge must be repatriated, and, when this takes place, it must be a means of discharge which the law of that country recognises and authorises, provided that the unit of
- G** account has not ceased to exist. There is, of course, a distinction where the currency of the country has depreciated in the interval. [Counsel referred to *Cuming v. Monro* (3), *S.S. Celia v. S.S. Volturno* (4), *Pollard v. Herries* (5), *Suse v. Pompe* (6), *Cohn v. Boulken* (7), *Anderson v. Equitable Assurance Society of United States* (8), *Auckland Corp'n. v. Alliance Assurance-Co., Ltd.* (9), *British Bank for Foreign Trade, Ltd. v. Russian Commercial & Industrial Bank* (2), *Re Chesterman's Trusts*, *Mott v. Browning* (1), *Ottoman Bank of Nicosia v. Chakarian* (10) and *Burgess v. Diaz* (11).]

Willink, K.C., in reply: This was a contract to deliver commodities in Gibraltar. Pesetas in gold cannot have been contemplated. To pay

the debt in silver in 5-peseta pieces would have meant handing over about $2\frac{1}{2}$ tons of the metal. This was obviously not intended. A cheque was not contemplated, and the only thing left is peseta notes. In Spain, it is possible to make contracts in pesetas, to which the law of legal tender does not apply. [Counsel referred to *Ottoman Bank of Nicosia v. Chakarian* (10), *Anderson v. Equitable Assurance Society of United States* (8), *Re Chesterman's Trusts*, *Mott v. Browning* (1) and *British Bank for Foreign Trade, Ltd. v. Russian Commercial & Industrial Bank* (2).]

LORD PORTER : The appellants are incorporated in Gibraltar, and carry on business as an investment company. The appellant John Mackintosh is a director of that company. In May, 1935, the appellants were anxious to borrow a large sum of Spanish pesetas, as they did not wish to convert English pounds sterling into that currency, and at that time the respondent had on deposit at Barclays Bank in Gibraltar a credit of over 500,000 pesetas standing in the names of Messrs. Carrara, King and Marsh, who were trustees of her late husband. The respondent is an old lady, 82 years of age, whose business affairs were managed by her nephew, one Eugenio Gross. Mr. King, who was a friend of both Mr. Mackintosh and the respondent, having heard that the appellants desired to borrow pesetas, approached Mr. Mackintosh and arranged with him that the respondent should lend, and the appellants borrow, the sum of 500,000 pesetas, at $3\frac{1}{2}$ per cent. interest per annum. Accordingly, the appellants executed a bond, dated May 22, 1935, whereby they bound themselves to pay the respondent the sum of 500,000 pesetas on May 22, 1936, and meanwhile to pay interest at $3\frac{1}{2}$ per cent. per annum by half-yearly instalments on Nov. 22, 1935, and May 22, 1936. Upon the execution of the bond, Mr. Pons, the accountant employed by the trustees, prepared and filled in a cheque for 500,000 pesetas drawn on Barclays Bank, Gibraltar, and the cheque was signed by the trustees, in whose name the credit stood. The cheque was then handed to Mr. Mackintosh, or to his secretary, Mr. Caston, and paid into the appellants' account at Barclays Bank. From time to time, the appellants drew cheques, varying in value between 6,000 and 70,000 pesetas, upon this account, and the whole amount was so withdrawn by the appellants before the end of 1935. Meanwhile, on Nov. 22, 1935, the half-year's interest was duly paid.

Before and up to 1898, Spanish peseta coinage was legal tender in Gibraltar, but by an order in council of Aug. 9, 1898, sterling money of Great Britain became the only legal tender, subject to certain exceptions not material to the present case. Nevertheless, pesetas were in frequent use, and were regularly given and taken as payment in commercial transactions in Gibraltar. The peseta was, and remains, the unit of Spanish currency. It is common ground that at all material times gold coins without limit, and silver coins of 5 pesetas alone, were legal

tender in Spain. It is true that the Bank of Spain were authorised to issue peseta notes, and that for certain purposes—e.g., the payment of sums due to the government—those notes must be accepted, but in ordinary transactions between individuals they could be refused. In practice, of course, they were accepted, inasmuch as the Bank of Spain were under an obligation to meet their notes by providing gold or silver on presentation, but, if a strict fulfilment of his obligations were insisted on, a borrower would not fulfil them by tendering notes. He must furnish gold or silver coin. In Gibraltar, pesetas, whether in the form of gold or silver or notes, were not currency at all. They were a commodity which could be bought or sold, like any other commodity. Up to Mar., 1936, however, peseta notes were commonly given and accepted, both in Spain and in Gibraltar, as the equivalent in value of the coinage they represented.

By a Spanish decree of 1930, the export of silver from Spain was prohibited. Even before 1936 regulations had been made prohibiting the exportation of bank notes in excess of 5,000 pesetas, and on Mar. 16, 1936, the Spanish government, apparently perturbed by the fact that refugees leaving Spain were found to be taking with them a large number of peseta notes, enacted a further decree under which travellers were prohibited from exporting any notes of the Bank of Spain unless accompanied by an authorisation called a *guia*. These *guias* were issued by the customs authorities, who were required to send a daily report of the *guias* issued by them, stating the names of the travellers and amounts authorised. After the date of the decree, it became illegal for notes to be reintroduced into Spain unless accompanied by *guias* corresponding in amount to the pesetas proposed to be brought in. Once the external notes were wedded to an appropriate *guia*, they could be reintroduced, and, as they were exchangeable at the Bank of Spain for metal of their nominal amount, they were of the same value as the coinage they represented. However, there was a large number of peseta notes already in Gibraltar for which *guias* were not necessarily forthcoming. It is true that, by art. 5 of the decree, these peseta notes might be remitted to Spain within 5 days of the decree, but it is by no means clear that the owners would take advantage of this section, since the notes, once in Spain, could only be exported by permission of the customs authorities, and in any case, owing to the prohibition of the export of silver, no silver could be taken out in their place. In addition to these extraneous peseta notes, it appears that a large number of notes reached Gibraltar without any accompanying *guias*, because many refugees were arriving from Spain bringing notes with them without obtaining *guias*. The result was that there were in use in Gibraltar, after the date of the decree, two types of notes—those accompanied by *guias* and those unaccompanied.

Precisely how the decree worked does not appear from the decree itself, and was not explained in evidence. Presumably any *guia* might

be used for the reintroduction of the same number of peseta notes as it permitted to be exported, and it was not necessary that it should accompany the same notes which were exported under its authority. However, in their Lordships' view, it is not necessary to determine this point. Naturally, since the notes for which *guias* were supplied could be remitted to Spain, and those for which *guias* were not supplied could not, the former had a higher value than the latter, but both continued to be used in Gibraltar. A

In these circumstances, when the date for repaying the loan of 500,000 pesetas and the second half-year's interest was approaching, Mr. Pons saw Mr. Caston, and told him that, if payment were to be made with notes, they should be accompanied with *guias*. Presumably as a result of this conversation, Mr. Mackintosh wrote on May 16 to Mr. King, offering to pay (a) by cheque on Madrid, (b) by bank notes delivered in Gibraltar, or (c) equivalent sterling at 42 pesetas to the £, 42 pesetas to the £ being the rate of exchange for peseta notes without *guias*. At the same time, Mr. Mackintosh suggested postponement of payment for 2 weeks. In reply, Mr. King stated that a cheque on Barclays Bank in pesetas would be acceptable, but, as it appears from the evidence that that bank dealt only in pesetas accompanied by *guias*, Mr. King's suggestion was in the nature of a counter-offer. B C D

On May 28, Mr. Caston called on Mr. Pons and offered to pay the interest up to May 22 in notes without *guias*. This offer was refused, and ultimately Mr. Caston paid 8,750 pesetas in silver. Later, on June 19, 1936, Mr. Prescott, a public notary, called on behalf of the appellants on Mr. Pons, paid the interest due up to that date in silver, and tendered a cheque on the Credit Foncier for 500,000 pesetas. Mr. Mackintosh had in fact opened a credit with that bank for that sum by lodging with it 500,000 peseta notes obtained partly from an Indian money-changer and partly by purchases of small sums, when he could get them, at an exchange of about 42 to the £. Admittedly, the Credit Foncier would not have supplied *guias* with these notes, and the payment was refused unless corresponding government *guias* were also provided. On the same day, and after this refusal, the appellants informed the respondent by letter that they had notified the Credit Foncier in Gibraltar to hold at her disposal the sum of 500,000 pesetas, and disclaimed liability for further interest. Finally, on Oct. 5, the respondent's solicitors wrote stating that they had refused payment by cheque on Madrid or bank notes delivered in Gibraltar because such payment would not permit the respondent to deal with such sum, and had refused payment at the rate of 42 pesetas to the £, inasmuch as that rate of exchange was over and above the official rate. The appellants thereupon, on Oct. 19, tendered a bundle of 500,000 peseta notes without *guias*. This tender was refused, and action was then brought, and the appellants by some means appear to have succeeded in lodging this bundle in court. Presumably they intended by this means to make a payment into court, E F G H

but, as pesetas are not currency in Gibraltar, their action was misconceived, and could have no effect upon the result of the case.

Both sides admitted before this Board that the contract was for the supply and return of pesetas in Gibraltar, and therefore for the supply and return of commodities, and not of money, an admission which their Lordships consider to have been rightly made. The first question, therefore, which has to be determined is what commodity the appellants contracted to tender to the respondent on May 22, 1936. For the appellants, it was argued that in Gibraltar pesetas meant peseta notes, that these notes were in regular use in Gibraltar at the time of the making of the contract, that, though they were not legal tender in Gibraltar, and might not be legal tender in Spain, yet they were treated as equivalent thereto, that peseta notes were in fact supplied by the respondent to the appellants in fulfilment of the contract, and that peseta notes were, therefore, all that the appellants were under an obligation to return. For the respondent, it was contended that the contract was for the supply of pesetas, that a credit on Barclays Bank was accepted in performance of that contract, that peseta notes were not supplied, and, indeed, if it were material, that the appellants never operated the credit so as to receive peseta notes, but merely transferred to third parties, by means of cheques, the credit which had by cheque been transferred to them, that the appellants were, therefore, under an obligation to return pesetas, and that that obligation was not fulfilled by the tender of peseta notes.

In their Lordships' opinion, it is established by the evidence that the commodity agreed to be supplied was pesetas, and that the appellants accepted a credit upon Barclays Bank in fulfilment of that contract. It follows that, in their view, the appellants' contract was to return 500,000 pesetas in Gibraltar on the due date—namely, May 22, 1936. What, then, is meant by such a contract? The word "peseta" means the unit of account in the currency of Spain. The appellants have contracted to supply 500,000 of such units, and their Lordships can find nothing in the contract between the parties to the present litigation to modify that meaning.

The question can, therefore, be stated in another form by asking: What performance is required to fulfil an obligation to pay a foreign unit of account? This question does not come before their Lordships devoid of authority. It has already been discussed in *Re Chesterman's Trusts, Mott v. Browning* (1), where the direct question came under consideration. It was there held by RUSSELL, J., now LORD RUSSELL OF KILLOWEN, and by the Court of Appeal, that the obligation was to pay in whatever, at the date of repayment, was legal tender and legal currency in the foreign country whose money was lent. This decision is not binding on their Lordships, but they think that it correctly enunciates the law applicable to the case. In their view, the appellants borrowed 500,000 units of account of the republic of Spain, not 500,000 peseta notes. In

performance of that contract they accepted a credit on Barclays Bank for 500,000 pesetas, and they were under contract to return 500,000 such units of account. That contract is not fulfilled by the tender of 500,000 peseta notes. Such notes are not units of account of the Spanish Republic. They were, it is true, frequently accepted in lieu of units of account, but the party to whom they were tendered was not obliged to accept them. To adapt the words of WARRINGTON, L.J., in *Re Chesterman's Trusts, Mott v. Browning* (1), at p. 483, the form in which such payment is to be made must be regulated by the municipal law of the country whose unit of account is in question, and what would or would not be a legal tender must depend upon the law on that subject in force at the time when the tender should have been made. If this were not so, their Lordships are unable to appreciate what principle is to be applied in ascertaining the nature of the commodity of which tender has to be made. A B

It is suggested that RUSSELL, J., as he then was, took a different view in *British Bank for Foreign Trade, Ltd. v. Russian Commercial & Industrial Bank* (2), where he is reported to have said, at p. 67 : C

(2) . . . The true position was that the loan was repayable in any paper roubles issued by authority of the Russian government, and in use at the material date.

(3) It was argued that if the debt was to be paid outside Russia it must be paid in gold roubles, because any paper money was only legal tender in Russia, and not outside. He did not agree with that view. The mortgagor was suing to recover his securities and was entitled to do so if he fulfilled his legal contract. If he made repayment in full in the kind of money actually advanced to him—paper roubles issued by authority of the Russian government—it did not matter whether that paper money was legal tender in or out of Russia. D

It is suggested that his earlier view is to be preferred to the later one. Their Lordships do not think that there is any conflict between the two cases. In their opinion, "in use at the material date" means in use as legal tender. Moreover, the statement that "it did not matter whether the paper money was legal tender in or out of Russia" was used in answer to the argument that the tender must be legal out of Russia as well as in Russia, and is a sufficient answer to that argument. E F

Some discussion took place before their Lordships as to whether in any case the appellants had fulfilled their contract in due time, even if tender of notes of the Bank of Spain were a fulfilment of the contract. Having regard to the view which the Board takes, it is not necessary to determine this matter, nor is it material to consider what would have been the result if the respondents had furnished bank notes, and not a credit upon Barclays Bank, in fulfilment of their part of the contract. No dispute appears to arise as to the sum found to be due by SIR KENNETH JAMES BEATTY, C.J. Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants must pay the respondent's costs before the Board. G H

Solicitors : *Adler & Perowne* (for the appellants) ; *William A. Crump & Son* (for the respondent).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

OXFORD CITY COUNCIL v. OXFORDSHIRE COUNTY
COUNCIL.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Porter), **November 10, 11, December 13, 1938.**]

A *Local Government—Extension of city boundaries to include part of county area—Loss to county ratepayers—Whether city council liable to compensate county council—Local Government Act, 1888 (c. 41), s. 62—Local Government Act, 1894 (c. 73), s. 68, Sched. I, Part II—Local Government (Adjustments) Act, 1913 (c. 19), s. 1 (1) (b)—Local Government (County Boroughs and Adjustments) Act, 1926 (c. 38), s. 5—Oxford Extension Act, 1928 (c. lxxxiv), ss. 33, 61—Local Government Act, 1929 (c. 17), ss. 30, 134.*

By the Oxford Extension Act, 1928, certain areas, profitable from a rating authority's point of view, were transferred from the respondents to the appellants. By the Local Government Act, 1929, liability to repair roads was in certain cases transferred to county councils. The respondents, the county council, claimed that this involved them in a loss which was a result of the Oxford Extension Act, 1928, and for which they were entitled to be compensated by the appellants, by reason of the Local Government (Adjustments) Act, 1913. The Oxford Extension Act, 1928, came into force 4 days after the Local Government Act, 1929, received the Royal Assent, but the Act of 1929 did not come into force until a year later :—

HELD : as the language of sect. 1 of the Act of 1913 could not be fitted to the facts of the present case, there being no increase of an existing burden in consequence of the alteration of boundaries, the respondent county council were not entitled to receive compensation for the loss sustained.

Order of Court of Appeal ([1938] 1 All E.R. 801) discharged, and order of the Divisional Court restored.

[EDITORIAL NOTE. The question here is whether the claims here made can be brought within the terms of the Local Government (Adjustments) Act, 1913, s. 1, and the facts of this case fitted into that section. Upon this the Court of Appeal differed, and the House of Lords have here upheld the strong dissenting judgment of BENNETT, J., and have, in fact, practically adopted that judgment. The opinion of LORD WRIGHT (with which the other learned Lords concur) reinforces the view of the Court of Appeal that a Divisional Court, when giving their decision upon a consultative case, should state the reasons for their conclusions.

AS TO ADJUSTMENT OF BURDENS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 250-252, para. 451; and FOR CASES, see DIGEST, Vol. 33, pp. 25-27, Nos. 113-131.]

Case referred to :

- (1) *Caterham Urban District Council v. Godstone Rural District Council*, [1904] A.C. 171; 33 Digest 26, 124; 73 L.J.K.B. 589; 90 L.T. 653; *revsg.*, [1903] 1 K.B. 554.

APPEAL from an order of the Court of Appeal dated Mar. 7, 1938, and reported [1938] 1 All E.R. 801, allowing an appeal from an order of the Divisional Court, dated May 24, 1937, on a special case stated by an arbitrator.

Cyril Radcliffe, K.C., Maurice FitzGerald, K.C., and D. Stewart-Brown for the appellants.

R. M. Montgomery, K.C., and S. Cope Morgan for the respondents.

LORD ATKIN [read by LORD THANKERTON]: My Lords, I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend LORD RUSSELL OF KILLOWEN, and, as I entirely agree with it, I find it unnecessary to repeat the reasons for restoring the decision of the Divisional Court. I wish to add that I share the views about to be expressed by my noble and learned friend LORD WRIGHT A as to the desirability of reasons being given by the Divisional Court on a consultative case.

LORD THANKERTON: My Lords, in this case I have had the privilege of considering the opinion which is about to be delivered by my noble B and learned friend LORD RUSSELL OF KILLOWEN, and I desire to express my complete concurrence in it.

LORD RUSSELL OF KILLOWEN: My Lords, by the Oxford Extension C Act, 1928, which came into force on Apr. 1, 1929, the boundary of the city and county borough of Oxford was extended so as to include areas which were formerly in the administrative county of Oxford—namely, a part of Headington Urban District, a part of Headington Rural District and a part of Woodstock Rural District. By the same Act, parts of three D parishes were transferred from the Woodstock Poor Law Union, which was wholly situate in the administrative county of Oxford, to the Headington Poor Law Union, which was situate partly in the county borough of Oxford and partly in the administrative county of Oxford. In consequence of this extension, an increase of burden was thrown upon the ratepayers E of the two rural districts in meeting the cost incurred by the rural district councils in the execution of their powers and duties as highway authorities, and, in consequence of the transfer of part of their area to the Headington Union, an increase of burden was thrown upon the ratepayers in the area of the Woodstock Board of Guardians in meeting the cost incurred by F that board in exercise of their functions as poor law authority.

On Apr. 1, 1930, by virtue of the Local Government Act, 1929, the rural district councils of Headington and Woodstock ceased to be highway authorities, and the roads which had hitherto been maintainable by those councils respectively became maintainable by the respondents. The G cost thereof became chargeable upon the county ratepayers. By virtue of the same Act, and on the same date, the Woodstock Board of Guardians and the Headington Board of Guardians ceased to exist. The functions of the Woodstock board were transferred to the respondents. The functions of the Headington board were transferred partly to the H appellants and partly to the respondents.

The Oxford Extension Act, 1928, contained provisions (sects. 33 and 61) the purpose of which was to enable the authorities from which what I may call "beneficial areas" had been taken, to obtain financial adjustment from the appellants to whose area they had been added. Sect. 33

provides for such adjustment being made by agreement or arbitration. Sect. 61 enacts that sect. 62 of the Local Government Act, 1888 :

... shall apply to any adjustment which may become necessary in consequence of this Act and for the purposes of such application that section shall have effect (a) as if in subsects. (5), (6) and (7) thereof the expression " council " included any authority affected by this Act or by anything done in pursuance of this Act.

A By a decision of your Lordships' House in *Caterham Urban District Council v. Godstone Rural District Council* (1), it was established that an arbitrator had no power in making an adjustment under the Local Government Act, 1888, to take into account the loss occasioned to ratepayers by the taking away from a rural district council of a beneficial area. This state of affairs was subsequently modified by the Local Government (Adjustments) Act, 1913. Since the present appeal depends, as I think, upon the true construction of that Act, I state its relevant provisions verbatim. They run thus :

C 1. (1) On any adjustment under . . . the Local Government Act, 1888, s. 62 . . . (b) provision shall be made for the payment to any authority of such sum as seems equitable in accordance with the rules contained in Part II of the Schedule to this Act, in respect of any increase of burden which will properly be thrown on the ratepayers of the area of that authority in meeting the cost incurred by that authority in the execution of any of their powers and duties as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place.

D (2) This section shall apply to any adjustment made (otherwise than by agreement) under the Local Government Act, 1888, ss. 32, 62, and the Local Government Act, 1894, s. 68, whether as originally enacted or as applied in England or Wales by any other Act, or by any provisional order, or by any order made or confirmed by the local government board under the Local Government Act, 1888, or the Local Government Act, 1894, and consequent on an alteration of boundaries or other change effected after the passing of this Act.

E Part II of the Schedule is in the following terms :

Rules for determining sum to be paid in respect of increase of burden on ratepayers

F (1) Regard shall be had to (a) the difference between the burden on the ratepayers which will properly be incurred by the authority in meeting the cost of executing any of their powers and duties and the burden on the ratepayers which would properly have been incurred by the authority in meeting such cost had no alteration of boundaries or other change taken place ; (b) the length of time during which the increase of burden may be expected to continue : Provided that no alteration of income in consequence of an apportionment under Part I of the Schedule shall be taken into account.

G (2) The sum payable to any authority in respect of the increase of burden shall not exceed, or if payable by instalments or by way of annuity, the capitalised value of the instalments or annuity shall not exceed the average annual increase of burden multiplied by fifteen.

(3) Any sum payable in respect of the cost of the maintenance of main roads shall be payable by way of annuity.

The multiple of 15 was subsequently increased by legislation to 21, so far as the increase of burden is attributable to roads, but this is immaterial.

H. Claims for financial adjustment were made upon the appellants by the two rural district councils in respect of the estimated increases of annual burden on the ratepayers of their respective areas in regard to the maintenance of highways. These were settled on the basis that, owing to the provisions of the Local Government Act, 1929, the burden (and, therefore, the increase) could have existed for one year only, a sum

of £1,925 being paid to Headington and a sum of £650 being paid to Woodstock. Claims for financial adjustment were also made by the respondents against the appellants, who agreed to pay, and paid, a sum of £195,000 in full settlement of all the respondents' financial claims arising out of alteration of areas, other than such claims (if any) as the respondents might be entitled to make for increase of burden as from Apr. 1, 1930, in respect of the maintenance of the roads transferred to them from the two district councils by the Local Government Act, 1929, and in respect of the administration of public assistance. Subsequently, the respondents sent in two alternative claims against the appellants in respect of each of these matters. The appellants refused to admit any of the four claims, and Sir Lynden Macassey was appointed by the parties to arbitrate between them. By agreement, he stated a consultative case for the decision of the court. In para. 2 of the special case, he states the four claims, the two alternative claims in respect of increase of burden on county ratepayers in meeting the cost of road-maintenance being set out under heads (A) and (B) respectively, and the two alternative claims in respect of increase of burden on county ratepayers in meeting the cost of public assistance being set out under heads (C) and (D) respectively.

The arbitrator stated the question for the decision of the court in the following words :

Whether or not I ought in determining the sum (if any) to be paid in respect of increase of burden on the ratepayers of the administrative county of Oxford, to have regard to any and which of the matters set out in para. 2 (A), (B), (C) and (D) hereof.

The question does not seem to me to have been very happily worded. The alternative claims were the only matters in dispute, but the question as framed is perhaps consistent with the view that, even if no regard is to be paid to any of the matters referred to, a sum might nevertheless be payable. In truth, the point of law for determination was whether the respondents were entitled to make any claim upon the appellants in respect of any alleged increase of burden on the county ratepayers in meeting either the cost of maintenance of roads vested in the county council under the Local Government Act, 1929, or the cost of public assistance. The Divisional Court answered the question in the negative :

... that regard should not be had to any of the matters set out in para. 2 of the special case.

They gave no reasons, following, in that respect (which I think is a matter for regret), the old practice which arose and prevailed when there was no appeal from the decision. On appeal, the Court of Appeal disclosed very divergent views. GREER, L.J., thought that the arbitrator should have regard to the matters set out in para. 2 (A) and (C) of the special case. MACKINNON, L.J., was of opinion that he should have regard, not to those matters, but to matters approximating or similar to those set out in para. 2 (B) and (D). BENNETT, J., was in favour of dismissing the appeal. The formal order of the Court of Appeal answered the question

in the affirmative. The true result which emerges at this stage is, I think, that the majority were of opinion that the claims were good in law, and that the arbitrator should proceed to settle the amounts, aided in his task by the judgments delivered, and with power, no doubt, if still in difficulty, to apply for, and obtain, further assistance.

A The question for our determination now is, as I conceive it, whether the claims are good in law. This in turn depends upon the true construction of the Local Government (Adjustments) Act, 1913, for it is conceded, and rightly so, by the respondents that the basis of their claims must be found in that Act, or, to put the position in another way, unless

B they can bring themselves and their claims within the language of the 1913 Act, the claims are bad in law under the *Caterham* decision (1).

My Lords, once we reach it, the point is a short one, and, in my opinion, reasonably plain. But for the fact that two members of the Court of Appeal (whose opinions I hold in great respect) have taken different views,

C I would, speaking for myself, have been content to concur with the judgment of BENNETT, J. He has covered the whole ground, and I agree with his conclusions and the reasoning upon which they are founded. As he truly says, the crux of the matter upon which the whole case depends is whether the language of sect. 1 of the Act of 1913 can be fitted

D to the facts of the present case, or, conversely, whether the respondents and their claims in question can be fitted into that section. I agree with him that the words of the section do not apply to a case (such as the present) where, subsequent to an accomplished change of boundaries,

E a new duty is laid upon a local authority, and a new burden is laid on the ratepayers of that authority to enable the local authority to discharge the new duty. In such a case, there is no increase of an existing (or, indeed, any) burden as a consequence of an alteration of boundaries. I would only add that, in my opinion, sect. 1 (1) (b) of the Act of 1913 postulates by its language the existence of two burdens (a smaller burden

F and a larger burden) each of which is thrown on the ratepayers of the area of one and the same authority in meeting the cost incurred by that authority in executing any of its powers and duties, the burden becoming larger as a consequence of an alteration of the authority's boundaries. That is to say, it postulates an authority imposing a burden on the rate-

G payers of its unreduced area, and the same authority subsequently imposing a larger burden on the ratepayers of its reduced area.

Arguments were addressed to us founded upon the phraseology of Part II of the Schedule, but the wording of these rules for measuring the sum (if any) payable under the provisions of sect. 1 throws no useful

H light on the question of what circumstances must exist before any sum is payable at all. An argument was also based upon the Local Government Act, 1929, s. 117 (4). That subsection, so far as material, runs thus :

So much of any sum paid or payable to a district council under the Local Government (Adjustments) Act, 1913, or otherwise by way of adjustment on alteration

of boundaries or other change, as represents compensation to the council in respect of the increase of the burden on the ratepayers in meeting the cost incurred by that council in the execution of their functions in respect of roads to which this section applies and has not, on the appointed day, been exhausted or applied in or towards the discharge of liabilities transferred to the county council under this section or which would have been so transferred if undischarged, shall, in the case of a sum paid or payable to the district council by another district council within the county, be repaid to that council, and in any other case be paid to the county council.

A

That subsection might no doubt have entitled the respondents to receive moneys from the appellants if any adjustment moneys had still been payable by the appellants to either of the two rural district councils. But nothing was payable. The subsection has no application to the facts of this case, and it certainly does not operate to vest in the respondents a right to the compensation for increase of burden which the two rural district councils might have been entitled to receive from the appellants had their functions as highway authorities not been transferred to the respondents by the Local Government Act, 1929.

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There is a further consideration which appears to me very material. It was the later Act of 1929 that altered the *status quo*, and it is in that Act that one would expect to find the results of the alteration dealt with. It is, therefore, natural to find the subject of compensation for loss of a beneficial area dealt with in sect. 117 of the Act of 1929. The fact that the provision there made is limited in such a way that it does not include the present claim must be taken, in my opinion, to show the limited extent to which Parliament intended to remedy the consequences of the alteration of the *status quo* as regards this subject-matter, although it was clear that it restricted the period in respect of which the superseded authorities could claim. For the reasons stated, I am of opinion that the claims put forward by the respondents are bad in law. I would discharge the order of the Court of Appeal and restore the order of the Divisional Court. The respondents should pay the costs of the appellants both here and in the Court of Appeal.

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LORD WRIGHT : My Lords, I have had the advantage of reading in print the opinion just delivered by my noble and learned friend LORD RUSSELL OF KILLOWEN. I agree so completely with it that I do not desire to add anything.

There is a matter which arises incidentally on which I should like to make an observation. Your Lordships, I know, were sorry not to have the benefit of a reasoned judgment from the Divisional Court, or to be helped by the great experience of the judges of the King's Bench Division in these matters. I understand that the practice has been adopted of answering the questions presented by a consultative case in an arbitration by a simple yes or no, without detailed reasons. This, I think, is a comparatively recent practice, perhaps of about 15 years standing, adopted because when there were three judgments, one from each of the judges in the Divisional Court, there was scope for differences of statement in the reasons, and this was liable to lead to confusion and to

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further litigation. While I recognise the force of this way of looking at the position, I cannot help observing that now, when an appeal from the Divisional Court has been given in these cases, subject to leave, a reasoned judgment of the Divisional Court is likely to be of great value. Not only is it certain to help the appellate court, but it may often prevent an appeal, when a possible appellant has an opportunity of appreciating the weight of the reasoning on which the Divisional Court has proceeded. The difficulty which might well arise from there being more than one judgment might, it seems, be obviated by a practice of having a single reasoned judgment, which constitutes the judgment of the court, a practice frequently adopted in the Court of Appeal and the Divisional Court, while in this House there is often a single opinion in which the other learned Lords concur. It may be that the change in the law effected by the Arbitration Act, 1934, may afford a suitable occasion to make some such change, but I must not be taken to be suggesting to LORD HEWART, L.C.J., and the judges of the King's Bench Division what form their practice should take. I merely venture on an observation which has occurred to me in considering this case.

LORD PORTER : My Lords, I concur in the opinion delivered by my noble and learned friend LORD RUSSELL OF KILLOWEN, and I also concur in the views expressed by my noble and learned friends LORD WRIGHT and LORD ATKIN. I, too, think that it would be of great assistance to your Lordships' House to have the advantage of knowing the grounds upon which the Divisional Court have come to their conclusions.

Appeal allowed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *A. Holt*, Town Clerk, Oxford (for the appellants); *Cunliffe & Airy*, agents for *F. G. Scott*, Clerk to the Oxfordshire County Council (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

OWENS v. LIVERPOOL CORPORATION.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.),
December 6, 12, 1938.]

Damages—Mental shock—Collision between tram-car and hearse—Coffin overturned but not thrown out of hearse—Whether apprehension of injury to human being essential.

A funeral procession was passing along a street when a tram-car negligently driven by the servant of the defendants collided with the hearse, broke its glass side and overturned the coffin, so that there was a danger of its being ejected into the road. The plaintiffs, the relatives of the deceased, were in a carriage following the hearse. One of them actually saw the impact, the others saw its effect immediately after it had happened. The plaintiffs claimed damages for severe shock, and one of them, the aged mother of the deceased, claimed damages for severe shock and collapse. The judge at the trial found that each of the

plaintiffs did receive injury in the nature of shock, but dismissed the action, on the ground that there was no apprehension, or actual sight, of injury to a human being:—

HELD: the right to recover damages for mental shock is not limited to cases in which apprehension as to human safety is involved, but extends to every case where injury by reason of mental shock results from the negligent act of the defendant. The plaintiffs were, therefore, entitled to recover the damages assessed by the judge.

[EDITORIAL NOTE.] Damages for mental shock were here sought to be restricted to cases where there is apprehension of injury to a human being. The Court of Appeal have decided against this limitation, and have also considered the question of the varying liability of different persons to suffer injury from shock in any particular circumstances. It has been held that anyone doing a negligent act runs the risk of a sensitive person receiving a shock therefrom, and, so long as injury from shock can be proved by medical evidence, the doer of the negligent act is liable in damages.

AS TO DAMAGES FOR MENTAL SHOCK, see HALSBURY, Hailsham Edn., Vol. 10, pp. 106, 107, para. 133; and FOR CASES, see DIGEST, Vol. 17, p. 100, Nos. 149-152.]

Cases referred to:

- (1) *Victorian Railways Comrs. v. Coultas* (1888), 13 App. Cas. 222; 36 Digest 123, 818; 57 L.J.P.C. 69; 58 L.T. 390.
- (2) *Bell v. Great Northern Ry. Co. of Ireland* (1890), 26 L.R.Ir. 428; 36 Digest 123, case h.
- (3) *Dulieu v. White & Sons*, [1901] 2 K.B. 669; 36 Digest 124, 822; 70 L.J.K.B. 837; 85 L.T. 126.
- (4) *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141; 36 Digest 123, 819; 94 L.J.K.B. 435; 132 L.T. 707.
- (5) *Pugh v. London, Brighton & South Coast Ry. Co.*, [1896] 2 Q.B. 248; 29 Digest 401, 3178; 65 L.J.Q.B. 521; 74 L.T. 724.
- (6) *Wilkinson v. Downton*, [1897] 2 Q.B. 57; 17 Digest 100, 150; 66 L.J.Q.B. 493; 76 L.T. 493.
- (7) *Coyle (or Brown) v. Watson (John), Ltd.*, [1915] A.C. 1; 34 Digest 268, 2284; 83 L.J.P.C. 307; 111 L.T. 347; 7 B.W.C.C. 259.
- (8) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; 36 Digest 29, 151; sub nom. *Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154.

APPEAL by the plaintiffs from an order of His Honour JUDGE HARRISON without a jury, delivered at the Liverpool Court of Passage, and dated Jan. 11, 1938. The facts are fully set out in the judgment of the court delivered by MACKINNON, L.J.

R. H. Forrest for the appellants, the plaintiffs.

G. G. Blackledge for the respondents, the defendants.

Forrest: The effect of the modern cases is that shock without actual direct injury is now regarded as a physical harm, to be compensated by damages. The judge has found as a fact that the plaintiffs suffered from shock, and upon that finding the plaintiffs were entitled to judgment. [Counsel referred to *Pugh v. London, Brighton & South Coast Ry. Co.* (5), *Wilkinson v. Downton* (6), *Dulieu v. White & Sons* (3), *Coyle (or Brown) v. Watson (John), Ltd.* (7) and *Hambrook v. Stokes Brothers* (4).]

Blackledge: The finding of the judge is that there was only actual damage to the hearse, and that there was no apprehension of any injury

to any human being. Breach of duty whereby injury is caused to an inanimate object is not a breach of duty to a mere bystander. The principle of *Hambrook v. Stokes Brothers* (4) should not be extended to the present facts. [Counsel referred to *Re Polemis & Furness, Withy & Co.* (8), *Victorian Railway Comrs. v. Coultas* (1) and *Bell v. Great Northern Ry. Co. of Ireland* (2).]

McKINNON, L.J. [delivering the judgment of the court]: On Aug. 21, 1937, a funeral procession was going along Scotland Road, Liverpool. The hearse carried a coffin containing the corpse of a man, William Owens. It was followed by a carriage in which were the plaintiffs, who were respectively the aged mother of the deceased, an uncle, a cousin, and the cousin's husband. A tram-car was so negligently driven by a servant of the defendants that it collided with the hearse so violently as to break its glass side and overturn the coffin, so that, as was alleged, there was danger of the coffin being ejected into the road. One of the plaintiffs, the uncle, alone saw the actual impact of the tram-car with the hearse. The other three saw the effects of it immediately after it had happened. The plaintiffs sued the defendant corporation for damages sustained by them through the negligence of the tram-driver. They alleged that they "witnessed and were horrified by" the accident, that the aged mother had in consequence suffered from "severe shock and collapse," and that the other three had in consequence suffered from "severe shock." The deputy judge of the Court of Passage has found that each of the plaintiffs did receive injury in the nature of shock, to a varying degree, "from the actual sight of damage to the hearse containing the body of a near relative." He assessed the damages at £75 for the mother, £15 for the uncle, £100 for the cousin, and £11 for the cousin's husband.

An appeal from the Court of Passage is not like an appeal from a county court, so that only error in law can be raised in this court, and it would be open to us to review the findings of the deputy judge. However, though we may entertain considerable doubt whether we should have arrived at his conclusions as to injury being sustained by the plaintiffs, or as to its extent, we think that we ought to accept his findings, and ought not to interfere with them. What is perhaps more material is that we were not asked by counsel for the respondents to do so. The deputy judge, though he did so find, has dismissed the action. His reason for doing so is expressed in a single sentence:

In my view of the law, there must be apprehension of injury to a human being, or actual sight of injury to a human being, before a plaintiff can recover in circumstances of this nature.

By "circumstances of this nature" he clearly means claims for mental or nervous injury, unaccompanied by any physical damage to the plaintiff, or, as it has been put by LORD SHAW, "without any physical impact or lesion."

Cases of this nature have been frequently discussed in the last 50 years. They begin with the decision by the Privy Council of *Victorian Railways Comrs. v. Coultas* (1). It was there held that damages for nervous shock or mental injury were too remote, and could not be recovered. That decision, however, has been uniformly discredited and disapproved ever since. The first, and perhaps the loudest, voice in the chorus of dis-
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 approval was that of PALLES, C.B., in Ireland, in *Bell v. Great Northern Ry. Co. of Ireland* (2), in not the least remarkable of the judgments which established the pre-eminent reputation of that learned judge. In *Dulieu v. White & Sons* (3), KENNEDY, J., held that damages which
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 result from nervous shock occasioned by fright, though unaccompanied by any actual impact, may be recoverable in an action for negligence. Nevertheless, he held that the shock "must be a shock which arises from
 a reasonable fear of immediate personal injury to" the claimant. In *Hambrook v. Stokes Brothers* (4), it was held that the limitation thus
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 in posed by KENNEDY, J., was erroneous. That was the case of a mother affected by shock, not from any apprehension of personal injury to
 herself, but from such apprehension as to her young children. ATKIN, L.J., said, at p. 157 :

I can find no principle to support the self-imposed restriction stated in the judgment
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 of KENNEDY, J. . . . that the shock must be a shock which arises from a reasonable fear of immediate personal injury to oneself. . . . Personally I see no reason for excluding the bystander in the highway who receives injury . . . from apprehension of or the actual sight of injury to a third party. There may well be
 cases where the sight of suffering will directly and immediately physically shock the most indurate heart; and if the suffering of another be the result of an act
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 wrongful to the spectator, I do not see why the wrongdoer should escape.

Those two cases deal with shock resulting from apprehension as to personal
 injury to the claimant himself, or to some other person in whose safety
 the claimant is, from affection, or from mere humanity, concerned.
 Does it follow that, in a claim for damages for shock, there must in every
 case be apprehension of injury to some human being, as the deputy
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 judge thought? If real injury has genuinely been caused by shock from apprehension as to something less important than human life (for
 example, the life of a beloved dog), can the sufferer recover no damages
 for the injury he, or perhaps oftener she, has sustained?

On principle, we think that the right to recover damages for mental
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 shock caused by the negligence of a defendant is not limited to cases in which apprehension as to human safety is involved. The principle
 must be that mental or nervous shock, if in fact caused by the defendant's
 negligent act, is just as really damage to the sufferer as is a broken limb
 —less obvious to the layman, but nowadays equally ascertainable by the
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 physician. That alleged shock results from apprehension as to a less
 important matter may well be material in considering whether the allegation
 be proved. Fear that unfounded claims may be put forward,
 and may result in erroneous conclusions of fact, ought not to influence
 us to impose legal limitations as to the nature of the facts that it is per-

missible to prove. As KENNEDY, J., said, in *Dulieu v. White & Sons* (3), at p. 681 :

A I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim.

In the present case, the shock was said to have been occasioned, not by any fear for human life, but by the imperilment of the coffin containing the corpse of a near relative. In *Dulieu v. White & Sons* (3), at p. 684, PHILLIMORE, J., envisaged :

B . . . the experienced and cool citizen, the ideal *vir constans* for whom *εμπειρία* makes *ἀνδρεία*.

C A man of that polyglot character might readily be disbelieved if he alleged that such an incident as this had caused him the form of ill health which is known as shock. The present plaintiffs might well have been disbelieved in that assertion, but the deputy judge believed them, and we think that we must accept his findings of fact. It may be that the plaintiffs are of that class which is peculiarly susceptible to the luxury of woe at a funeral, and may be disastrously disturbed by any untoward accident to the trappings of mourning. Nevertheless, one who is guilty of negligence to another must put up with idiosyncracies of his victim that increase the likelihood or extent of damage to him. It is no answer to a claim for a fractured skull that its owner had an unusually fragile one. In the result, if we accept, as we do, the finding of the deputy judge that the plaintiffs genuinely suffered from that form of illness which is called shock as the result of the negligence of the defendants' servant, we think that the plaintiffs are entitled to recover the damages which he assessed, and that this appeal must be allowed. The defendants, on our intimating that we proposed to allow the appeal, but would put our reasons into writing, asked for leave to appeal to the House of Lords. As this case raises a point of principle of general importance, it is one in which such leave ought to be given. However, though it is of that character, it is also one in which only a small amount of money is involved, and the plaintiffs can have little or no interest in elucidating the question of law. In those circumstances, we think that we ought to give leave to appeal, but only upon the condition that the defendants undertake to pay the plaintiffs' costs in the House of Lords in any event. The present appeal will be allowed, with costs here and below, and judgment entered for the plaintiffs for the sums mentioned.

H *Appeal allowed, with costs in both courts. Conditional leave to appeal to the House of Lords.*

Solicitors : *Wild, Collins & Crossey*, agents for *Neville, Mullen & Co.*, Liverpool (for the appellants) ; *F. Venn & Co.*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the respondents).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

SHIPMAN v. SHIPMAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
July 21, November 23, December 9, 1938.]

Divorce—Insanity—“Persons under care and treatment”—Respondent at large “on trial” during 346 days—Reception order in abeyance—Detention in fact must be proved—Lunacy Act, 1890 (c. 5), s. 55—Matrimonial Causes Act, 1937 (c. 57), ss. 2 (d), 3—Divorce (Scotland) Act, 1938 (c. 50).

The respondent wife was first certified on July 31, 1915, and remained continuously in the asylum until Oct. 3, 1923, when she was provisionally released on trial until further order or relapse. On Oct. 1, 1924, the respondent having been living with her sister since Oct. 3, 1923, she was discharged from the asylum. A fresh reception order was made on July 2, 1926, because the sister was unable to keep the respondent indefinitely. From that date until the presentation of the petition she was released on many occasions, her release or return to the asylum being in every case solely dependent upon the convenience of the sister and the state of the sister's health. The orders were all in the same form, and were “on trial from this mental hospital until we make further order, or until relapse of the patient, whichever should first take place.” On no occasion was there any further order made, or anything that could properly be called a relapse. In Feb., 1933, five years before the presentation of the petition, she was absent from the asylum and remained so for 2 months thereafter. Over the five years, there had been an annual absence of greater or less duration, amounting in all to 346 days. It was found as a fact that the respondent during the whole time was incurably of unsound mind, but it was contended that she had not “been continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition” :—

HELD : (i) the respondent had not been continuously under care and treatment for 5 years within the meaning of the Matrimonial Causes Act, 1937, s. 2 (d).

(ii) the periods of absence were not periods of detention within the meaning of the Matrimonial Causes Act, 1937, s. 3 (a).

Consideration of and observations upon the form of orders in respect of the temporary release and final discharge of patients.

[EDITORIAL NOTE.] The judgment herein considers very carefully the orders which provide for the temporary absence and the final discharge of the patient. In the present case there was no question as to the incurable insanity of the patient. The question was whether she had been continuously under care and treatment for 5 years immediately before the presentation of the petition. The question of temporary absence from the hospital is no doubt one of degree, but in the present case the patient had been allowed by the authorities to live with her sister during part of each year, the total time of such absences amounting to approximately one year out of the five. In such circumstances, it is held that the patient had not been continuously under care and treatment within the meaning of the Act.

AS TO DIVORCE ON THE GROUND OF INSANITY, see HALSBURY, Supp., Divorce, para. 981.]

Cases referred to :

- (1) *Harnett v. Bond*, [1925] A.C. 669 ; 33 Digest 268, 1869 ; 94 L.J.K.B. 569 ; 133 L.T. 482.
- (2) *Southport Corpn. v. Morris*, [1893] 1 Q.B. 359 ; 41 Digest 672, 5035 ; 68 L.T. 221 ; *sub nom. R. v. Southport Corpn. & Morris*, 62 L.J.M.C. 47.

PETITION by husband for dissolution of marriage on the ground that the wife respondent was incurably of unsound mind and had been con-

tinuously under care and treatment for 5 years and upwards immediately preceding the presentation of the petition. The facts are fully stated in the judgment.

S. E. Karminski and J. E. S. Simon for the petitioner.

H. W. Barnard for the respondent.

A *The Solicitor-General (Sir Terence O'Connor, K.C.) and Theodore Turner* for the King's Proctor.

The Matrimonial Causes Act, 1937, provides as follows :

2. The following section shall be substituted for the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 . . .

B 176. A petition for divorce may be presented . . . either by the husband or the wife on the ground that the respondent . . .

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition . . .

3. . . . a person of unsound mind shall be deemed to be under care and treatment

C (a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, or of any order or warrant under the Army Act, the Air Force Act, the Naval Discipline Act, the Naval Enlistment Act, 1884, or the Yarmouth Naval Hospital Act, 1931, or is being detained as a criminal lunatic or in pursuance of an order made under the Criminal Lunatics Act, 1884 ;

(b) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of such detention as aforesaid ; and not otherwise.

D SIR BOYD MERRIMAN, P. : The wife is defending this suit through her sister, who was appointed guardian *ad litem*, and contends that the husband has not proved his case in accordance with the Acts. I can dispose of one point quite shortly. Mr. Barnard, quite rightly, in my opinion, has abandoned any attempt to contend either that the wife is not of unsound mind or that her condition is curable. Unfortunately, the terminology of this branch of medical science does not yet appear to be standardised, and some doubt was at first occasioned—in my mind, at any rate—by the fact that the only medical witness, the superintendent of the mental hospital in which the wife is a patient, used every technical term in a different sense from that intended by the doctors who gave evidence in the preceding cases in the same list, and who were men of outstarding eminence in this subject, saying, in effect, that no one who knew his business could use these terms in any other sense. Nevertheless, I am satisfied that the wife is suffering from dementia—I purposely refrain from affixing any epithet—and that, if her disease ever was curable, it has long since reached a stage when cure is impossible. It is unnecessary to say more about this element in the case.

H The petitioner is also required to prove that she has been “ continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition.” By the Matrimonial Causes Act, 1937, s. 3 :

. . . a person of unsound mind shall be deemed to be under care and treatment (a) while he is detained in pursuance of any order . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . . and not otherwise.

It is to be observed, first, that it is only while the wife is detained in

pursuance of such an order that she is deemed to be under care and treatment, and, secondly, that the statutory test is not satisfied unless she has been continuously under care and treatment, thus defined, for the statutory period. In other words, in the circumstances of this case, the husband has to prove that she has been continuously under such an order for the prescribed period of 5 years. A

In this case, a reception order, which is admittedly an order of the kind referred to in the section, has been made in respect of the wife on two occasions. The first was made on July 31, 1915, and was discharged on Oct. 1, 1924. The second was made on July 2, 1926. The order in each case was for her reception in the East Riding of Yorkshire Mental Hospital, as it is now called. With regard to the second reception order, with which alone I am directly concerned, two questions arise, (i) whether or not, at the time of the presentation of the petition, the reception order remained in force, having regard to certain orders made meanwhile by the visiting justices, and (ii), assuming the reception order still to be in force, whether the wife can be held to have been detained in pursuance thereof continuously for the prescribed period when, for periods amounting in all to little less than 1 year out of the last 5 years, she has in fact been at large in circumstances which I will describe in detail later. B
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The first question is of comparatively limited importance, though undoubtedly it may affect other patients in the area concerned. The second question raises a vital and difficult point in connection with the statutory definition of "care and treatment," and is one of great general importance. Therefore I referred the case, at the conclusion of the evidence, to the King's Proctor for argument on both points under sect. 181 (i) of the principal Act. I have had the benefit of admirable arguments by the Solicitor-General, who appeared with Mr. Turner on behalf of the King's Proctor, and by Mr. Karminski and Mr. Barnard for the two parties, and I am most grateful to counsel for their assistance. E
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It will be convenient, before detailing the facts, if I summarise the material provisions of the Lunacy Act, 1890. Though the nomenclature has since been changed by the Mental Treatment Act, 1930, the particular provisions of the Lunacy Act, 1890, applicable to this case are those relating to the reception and detention of a lunatic in an asylum by order of a justice made upon sworn information, and, for convenience, I propose to use the old terms. By sect. 13 (2), it is provided as follows. G

Any such justice [being a judicial authority under the Act] upon the information on oath of any person whomsoever, that a person . . . is deemed to be a lunatic and is not under proper care and control . . . may himself visit the alleged lunatic, and shall, whether making such visit or not, direct and authorise any two medical practitioners whom he thinks fit to visit and examine the alleged lunatic and to certify their opinion as to his mental state, and the justice shall proceed in the same manner so far as possible, and have as to the alleged lunatic the same powers, as if a petition for a reception order had been presented by the person by whom the information with regard to the alleged lunatic has been sworn. H

Both reception orders in this case were made by a justice under this

section, by the very terms of which one is referred to the procedure and powers of a judicial authority in connection with a petition for a reception order. It is unnecessary to quote the relevant sections. It is sufficient to say that sect. 9 provides the definition of a judicial authority, which includes justices of the peace specially appointed in accordance with
A sect. 10. Sect 4 (2) and sect 5 lay down the procedure for the presentation of a petition, and sect. 6 prescribes the procedure thereon. The power to make a reception order is contained in sect. 6 (4). Finally, by sect. 4 (1) (omitting words irrelevant to this case, and incorporating the material parts of the definitions in sect. 341), it is enacted as follows :

B Subject to the exceptions in this Act mentioned, a person . . . shall not be received and detained as a lunatic in an [asylum provided by the East Riding of Yorkshire] unless under an order made for the reception of the lunatic in the asylum.

By sect. 35, the reception order is the authority for the person authorised to do so to take the lunatic and convey him to the asylum, and for his

C reception and detention therein. But for the reception order, whether made upon petition or by a justice upon sworn information, the reception and subsequent detention would, by the express words of sect. 4 (1), be illegal. On the other hand, as will appear, the reception order, so

D and detention, but also, in certain circumstances, for fresh reception and detention from time to time. The duration of a reception order is dealt with by sect. 38, as amended by the Lunacy Act, 1891, s. 7. It is sufficient to say that, if this reception order was in force at the material time, it need only be renewed every 5 years. The last two
E renewals were on June 6, 1933, and June 3, 1938, the latter, of course, being after the presentation of the petition.

Discharge from an asylum is dealt with in sect. 77 (1), by which any three visitors of an asylum may order the discharge of any person detained therein, whether he is recovered or not, and in sect. 77 (2),

F by which any two visitors, with the advice in writing of the medical officer, may order the discharge of any person detained in the asylum. It is to be observed, however, that, though discharge can be effected

by two visitors only upon the advice in writing of the medical officer. three visitors may order discharge whether the patient is recovered or

G not, and without the medical officer's advice. It is not expressly laid down that discharge under subsect. (2) depends upon the complete

recovery of the patient. I am prepared to assume, as appears to be generally accepted, that the medical officer may advise discharge, in

appropriate circumstances, though the patient is not recovered. As

H will be seen, that is precisely what occurred in connection with the first reception order in respect of the wife. It is also to be observed that

though the medical officer's advice must be in writing, there is no provision under either subsection that the visitors' order of discharge must

be in writing, or in any particular form. In this connection, reference must be made to sect. 339, whereby, subject to rules made under the

Act, the forms in Sched. II may be used, wherever applicable, with such modifications as circumstances may require, and, if used, shall be deemed to be sufficient. For example, Form 15 in Sched. II is that for a justice's reception order under sect. 13. There is no form in the schedule, however, either for discharge or for any of the temporary releases to which I am about to refer. It is also very important to note that there is no such thing as a "provisional" discharge. Once the order for discharge has been made, the procedure for certification, reception and detention must, if it becomes necessary, begin afresh.

Apart from removals, temporary or otherwise, which are particularly dealt with in sects. 36 and 37, there are several ways recognised by the Act in which a patient may in fact be at large from the asylum though the reception order remains in force. I will begin with the group of sections relating to escape. By sect. 85, it is enacted that, if any person detained as a lunatic under this Act escapes :

... he may, without a fresh order and certificate or certificates, be retaken at any time within 14 days after his escape by the manager of the [asylum] . . . in which he was detained, or any officer, or servant thereof respectively . . . or by anyone authorised in writing by such manager . . .

I call attention, in passing, to the use of the past tense in the phrase "in which he was detained."

The next three sections relate to escape from England into Scotland or Ireland, and *vice versa*, respectively, and to the issue of warrants in each country for the retaking of the lunatic and bringing him back to the place where he was detained. By sect. 89, a warrant, granted under any of the three preceding sections, does not authorise the retaking of a lunatic after the expiration of the time during which he could have been retaken according to the law in force in the place where he was detained as a lunatic if he had remained there after his escape. In other words, for example, if a lunatic detained in England escaped to Scotland, a warrant for his recapture would expire 14 days after his escape, whereas in the converse case the period would be 28 days : see the Lunacy (Scotland) Amendment Act, 1866, s. 6. Again I emphasise the words "in the place where he was detained as a lunatic." Sect. 57 relates to the boarding out of pauper lunatics only. Again, it is unnecessary to refer to the details of these provisions, which, like those relating to single patients and private patients, are not directly in point. It is only necessary to observe that the provisions of sect. 57 provide for the delivering of a pauper lunatic to the "custody" of a relative or friend.

This brings me to what, for the purposes of this case, is the most important section of all—namely, sect. 55, relating to absence on trial or for health. I must examine those provisions in some detail, but I pause to observe that, though the section deals, amongst others, with pauper lunatics in an asylum, there is, in contrast to sect. 57, no hint or suggestion throughout the section that the absences dealt with involve any sort of custody or detention. Subsect. (1) enables any two

visitors of an asylum, with the advice in writing of the medical officer, to permit a patient in an asylum to be absent on trial so long as they think fit. This applies to all patients in an asylum, whether paupers or not, though by subsect. (2) an appropriate allowance may be made in respect of a pauper lunatic absent on trial. Again, it is to be observed that, although the advice of the medical officer must be in writing, the order of the visitors need not be. I was informed that, acting upon an opinion of the law officers given over 30 years ago, it is not considered essential that the visitors' order for absence on trial should, in the first instance, fix a specified period. It is clear from the opinion of VISCOUNT CAVE, L.C., in *Harnett v. Bond* (1), at p. 676, where a form of order for absence on trial, under the corresponding provisions relating to private patients, was quoted without criticism, that, even if a period is fixed, it is permissible to provide that the leave of absence is revocable by the visitors during the period, and that the medical officer shall have power to take back the patient before the expiration of the period if his mental condition requires it. However, whether the period is fixed *ab initio* or *ex post facto*, it is provided by subsect. (8) as follows :

If a person allowed to be absent on trial for any period does not return at the expiration thereof, and a medical certificate certifying that his detention as a lunatic is no longer necessary is not sent to the visitors of the asylum . . . he may at any time within 14 days after the expiration of the period of trial be retaken as in the case of an escape.

That is to say, by virtue of sect. 85, he may, without a fresh order and certificate or certificates, be retaken at any time within 14 days by the manager of the asylum in which he was detained. Subsects. (3), (4), (5) and (6) contain the corresponding provisions relating to patients in hospitals (not being asylums) or licensed houses. Subsect. (3) (b) relates to absence on trial in such cases, while subsect. (3) (a), to which there is no corresponding provision in respect of an asylum, is usually referred to, I was informed, as absence "on holiday." Subsect. (7) enables the medical officer of a hospital or licensed house on his own authority to permit any patient to be absent for a period not exceeding 48 hours. Again, there is no provision corresponding to this in the case of an asylum, but, by sect. 275 (5), regulations which may be framed under this section may provide, amongst other things, for the absence, for a period not exceeding 4 days, of a patient from the asylum by permission of the manager. I was informed that in the East Riding Mental Hospital regulations are in force enabling the manager to grant leave of absence for 3 nights or 4 days.

With the provisions of these sections in mind, I now turn to the history of this case. As I have already said, the first reception order was made on July 31, 1915. From then until Oct. 3, 1923, the evidence is that the wife remained, to use a neutral word, continuously in the asylum. During this time, the husband was visiting her at fairly regular intervals. On Oct. 3, 1923, she was released on a form of order which, both in the original form in vogue in that year and in the altered form in vogue

during the later reception, has caused the difficulties in connection with the first point to which I referred at the beginning of my judgment. Before I deal with this, however, I will say a word about the circumstances of the releases. The husband stated in evidence that he strongly disapproved of it, and the result was that from that time onwards he took little, if any, interest in his wife, and hardly visited her at all. A However, it is not inopportune to observe that, as Mr. Karminski frankly admitted, the very point I have to decide on the issue relating to "care and treatment" would have arisen if, to take the actual dates in this case, the wife, in the week after the special report and certificate of June 6, 1933, which had the effect of renewing her reception order until B June, 1938, having obtained an order for absence on trial, had gone to live with her husband, and they lived together as husband and wife continuously from then until the date of the petition, Feb. 18, 1938.

To return to the wife's release in Oct., 1923, the form is headed "Order for discharge of patient." It is a composite form, which can be, C and later was, adapted to what, as I have already explained, is the only discharge known to law—namely, an absolute discharge. It reads as follows :

We, the undersigned, being members of the committee of visitors, with the advice in writing of the medical officer, hereby order the provisional discharge of the wife . . . D

Pausing there, the word "provisional" is filled in in writing in a blank space left between the words "the" and "discharge." The form continues . . . now detained" (the words "away on trial" being struck out) "from this asylum on trial," and here the printed words E "to the next meeting of the committee" are deleted, and the words "from this asylum until we make further order or until the relapse, whichever should first take place" are written in. The form is dated and signed by the two visitors, and underneath is a certificate from the medical officer that the above-named patients are in a fit state to be F provisionally discharged. Again, the word "provisionally" is written in a blank space left before the word "discharge."

On Oct. 1, 1924, the wife having remained continuously with her sister meanwhile, an identical printed form was adapted for what was called the "final" discharge of the wife, and other patients. In passing, G to illustrate the danger of confusion that was likely to arise from the use of this form, the medical officer began to write the word "provisionally," but substituted the word "finally." It is, however, unquestionable that the wife was discharged, in the full sense of the word, on that date. It is equally unquestionable that the discharge did not involve any H finding that she was recovered. There had, in fact, been no examination since the last renewal certificate, dated July 7, 1922, which showed, with details that I need not quote, that she was suffering from delusional insanity. This disease may, of course, assume very aggravated forms, or may be of the comparatively mild type with which the wife was

afflicted. However, the court, if satisfied that unsoundness of mind exists in an incurable form, is not concerned with the degree of insanity, except in so far as this is to be inferred from the one test prescribed by the statute. A spouse may be a raving lunatic of the worst description and hopelessly incurable, but such unsoundness of mind is not a ground
A for divorce unless it has resulted in the prescribed detention, or treatment. On the other hand, a spouse whose incurable unsoundness of mind is of a very mild type does come within the statute if the statutory test of "care and treatment" is fulfilled. This makes it all the more incumbent upon the court to be sure that, in law, the statutory test is
B satisfied.

On July 2, 1926, for no other reason than that her sister found herself unable to keep the wife indefinitely, a fresh reception order was made. I have had the evidence of Dr. Davie, who has been medical superintendent of the East Riding Mental Hospital since 1927. He told me that
C there had been virtually no change at all in the wife's condition from the date he took charge to the date of the hearing, and, as I have already said, he satisfied me that her condition of dementia, though by no means aggravated, was chronic and incurable. Since her reception in 1926, she has been released on many occasions. I have the last five orders
D before me. The first of these is dated Dec. 21, 1933. They have one feature in common—they were all made in the week before Christmas Day. It is admitted that the making of the order had no reference to any improvement in the wife's mental condition, which, as I have said, was more or less constant throughout. The medical superintendent
E accepted the inference that it was the calendar which fixed the date of her departure from the asylum. There is another feature common to all these periods of absence. They varied in length, but the variations had nothing whatever to do with any deterioration in the wife's mental condition, nor did they depend upon any action of the authorities of
F the asylum. The date of her return depended simply and solely upon the convenience of her sister, and the sister's own state of health.

To come back to the form, save that the new title of the hospital is substituted for the old, the wording of the form is the same as that in the earlier forms down to the words "now detained in this mental
G hospital." After the words "on trial," however, the words "to the next meeting of the committee," printed on the old form, have been omitted, and the following words have been substituted:

... on trial from this mental hospital until we make further order, or until the relapse of the patient, whichever should first take place.

H It is common ground in this case that on no occasion did the visitors make any further order, and it is plain that there was nothing which could be called the relapse of the patient. The only instance of an occasion which Dr. Davie faintly suggested might possibly be called a relapse—the development of a tendency to immerse articles in water—occurred, as his own renewal certificate on June 14, 1930, shows, before

and not, as he was mistaken in thinking, during, the relevant 5 years. Even so, it is not suggested that this new feature was the cause of her return to the asylum.

In these circumstances, I was naturally anxious to know how it came about that the wife was received back on 5 separate occasions without either of these conditions being fulfilled. The Solicitor-General frankly admitted that it was impossible to justify the use of this form. As it happens, she was released on Dec. 3, 1932, and remained absent until Apr. 21, 1933. I have not got the order relating to this particular release before me, but I gather that it was identical in form with those to which I have just been referring. This means that she was, in fact, absent from the asylum on the date when the 5 years immediately preceding the presentation of the petition began to run in Feb., 1933, and so remained for at least 2 months thereafter. There was, as I have already said, an annual absence of greater or less duration in each of the 5 years. Mr. Barnard informed me that the total number of days of absence during the five years amounted to 346. Dr. Davie accepted, with some reluctance, the suggestion that these periods might be described as "absences on trial." To illustrate the confusion with regard to what was occurring, I will quote the entry in the hospital book relating to the absence beginning on Dec. 23, 1932 :

She went out to-day on holiday to her sister, who will be responsible for her. Discharged on trial. She is not any better mentally.

The corresponding entry on her return is :

She returned from being on trial to-day ; there is no change in her mental state. There is no provision in the Act for sending asylum patients " on holiday." As I have already said, this is the phrase in current use in relation to private patients released from a hospital or licensed house for the benefit of their health under sect. 55 (3). She did indeed go to her sister, but there was no provision that her sister would be " responsible " for her. Nothing of the sort appears in the order, nor does any such provision appear in sect. 55. She certainly was not " discharged," though I am asked to say that she was absent " on trial." The Solicitor-General frankly admitted, as I have said, that this misuse of the terms in the Lunacy Act could not possibly be justified, but invited me, nevertheless, to say that on all these occasions the wife was, in fact, allowed to be absent on trial for an unspecified period under sect. 55 (1). He laid stress on the point, to which I have already alluded, that, among the forms in Sched. II the use of which is permitted, but not enjoined, by sect. 339, there is no form to meet this case, nor indeed are the visitors obliged to put their order in writing. He invited me, therefore, to hold that in substance, though not in form, the statutory provision relating to " absence on trial " had been complied with. He argued further that, as no period had been fixed beyond which the wife had outstayed her leave of absence by 14 days, and as there was no question of escape, the

reception order was at all material times in force, and, therefore, that it was lawful for the authorities to receive her back at any time, notwithstanding that the conditions relating to a further order, or the relapse of the patient, whichever should first take place, had not been fulfilled. He invited me to ignore these words in the order, as being misconceived,

- A if not actually *ultra vires*. I think that I am entitled to accept this argument, more especially as I was satisfied, notwithstanding the confusion in Dr. Davie's mind, possibly due to his having been at one time, as I was informed, in charge of private patients, that absence on trial was what he really meant by provisional discharge. That being so, I hold
- B that the reception order remained in force at all material times. I hope, however, that this case will result in this local authority putting their house in order, for the argument has shown that they are running a considerable risk, in matters unconnected with the Matrimonial Causes Act, by reason of the confusion which prevails in relation to the exercise
- C of their powers under the Lunacy Acts.

- On the assumption that the reception order in this case was in force at all material times, I have now to consider the question of more general importance—namely, whether or not the wife was continuously detained in pursuance thereof for the prescribed period. In substance, I am invited
- D to say that the words “while he is detained in pursuance of” a reception order, in the Matrimonial Causes Act, 1937, s. 3, are satisfied if a reception order is held to have been continuously in force for the prescribed period, in pursuance of which the wife was liable at any time therein to be received and detained in the East Yorkshire Mental Hospital, whether or not she
- E was actually so detained throughout the whole of the period. It goes without saying that this solution would be simple, and would relieve the court of all the difficulties which arise if detention in fact must be proved. Apart from the 14 days after an escape, during which a reception order is in force, it has been seen, from what has gone before, that there are
- F at least 4 varieties of permitted absence in the case of a lunatic in this asylum—namely, (a) any temporary outing, unattended, during the time of day when patients are not locked in, (b) leave of absence granted by the manager, under the regulations, for 3 nights or 4 days, (c) absence on trial for a fixed period, and (d) absence on trial for an indefinite period.
- G If detention, in fact, is requisite, it is obvious that these varieties of absence will require separate consideration. As at present advised, I should not be prepared to hold that detention would be interrupted by routine outings in the daytime, even though the only restrictions upon the movements of a patient were such as result from the limited time
- H available. The second case, and the corresponding case of 48 hours' leave in the case of a private patient, obviously create more difficulty. I will assume, without deciding, that an occasional absence of this sort would not be held to interrupt the period of detention, on the *de minimis* principle. Even so, such absences might be so frequent that it would be impossible to disregard the accumulation of days of freedom during the

5-years' period. It may be that there is raised the very question which LORD CLERIDGE, C.J., answered in *Southport Corp'n. v. Morris* (2), when he said, at p. 361 :

The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn. A

Whatever may be the position as regards the first two classes of permitted absence, it seems to me that, if detention in fact is requisite, absence on trial for prolonged and indefinite periods must be on the wrong side of any reasonable line that could be drawn.

As leading to the conclusion that detention, in fact, is intended, Mr. Barnard called my attention to the corresponding provisions of the Divorce (Scotland) Act, 1938. As this point arose after the Solicitor-General had concluded his argument, I had not the advantage of hearing his views upon it, but, at the close of the adjourned hearing, I intimated that I should be willing to hear him further if he thought it desirable to address me upon the point. I have, however, received an intimation that he does not desire to do so. It is not usually safe to draw any conclusion about the construction of one Act of Parliament from the wording of another, more particularly if the Acts in question relate to different systems of law, but I think that it would be foolish to ignore altogether a marked difference of wording in Acts passed in two successive sessions in relation to a subject upon which, as is notorious, public opinion in both countries was greatly exercised. The material parts of the Act are as follow. The corresponding ground for divorce under sect. 1 (1) (b) is that the defendant is incurably insane. Sect. 6, the interpretation section, reads as follows : B

(1) In this Act the expression "the court" means the Court of Session. (2) In any action of divorce on the ground of incurable insanity, the defender shall not be held to be incurably insane, unless it is proved that he is, and has been for a period of 5 years continuously immediately preceding the raising of the action, under care and treatment as an insane person, and where such care and treatment as aforesaid is proved, the defender shall, unless the contrary is shown to the satisfaction of the court, be presumed to be incurably insane. (3) A person shall be deemed to be under care and treatment as an insane person (a) while any order or warrant for his detention or custody as a lunatic under the Lunacy (Scotland) Acts, 1857 to 1919, the Army Act, the Air Force Act, the Naval Discipline Act, the Naval Enlistment Act, 1884, or the Yarmouth Naval Hospital Act, 1931, is in force ; (b) while he is under care and treatment (other than treatment as a voluntary patient) within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176, as amended by the Matrimonial Causes Act, 1937 ; and not otherwise. C

It will be observed that, whereas subsect. (3) (b) incorporates care and treatment under the English Acts other than the treatment as a voluntary patient which is included by the Matrimonial Causes Act, 1937, s. 3 (b), there is no reciprocal reference in the latter Act to care and treatment under the Lunacy (Scotland) Acts. D

I have looked at the Scottish Lunacy Acts. There are obvious differences between the two codes, both in form and in substance, but, whatever the differences, the two codes have one thing in common—namely, they are both designed to regulate the care and treatment of lunatics. E

Seeing that continuous care and treatment of a lunatic spouse for the prescribed period is a condition of divorce in both countries, it might reasonably be expected that the definition of care and treatment in the respective Divorce Acts would be substantially identical. At any rate, one might be tempted, in spite of a difference in the wording of the two definitions, to suppose that Parliament meant the same test to be applied in each case. However, I find that, in respect of this very subject of permitted absence from an asylum, there is one important difference between the two codes which, even if it stood alone, appears to be sufficient to account for the difference in the wording of the definitions of care and treatment, and to suggest that it must have been deliberate. By the Lunacy (Scotland) Act, 1866, s. 6, it is provided as follows :

In every case in which any lunatic or any person who has entered an asylum for treatment under authority of this Act is temporarily absent from the asylum or house for his reception into which the order was given, or shall escape from such asylum or house, or from the care of the officers thereof, such order shall remain in force in the same manner as if such lunatic or person as aforesaid were not absent or had not escaped : Provided always, that such lunatic or person as aforesaid shall return or be brought back to such asylum or house within a period not exceeding 28 days from the day on which he left or escaped from such asylum or house, or within a period of 3 months where such lunatic or person as aforesaid is accompanied by or remains under the care of the officers or attendants of such asylum or house.

On the other hand, under the English lunacy code, the visiting justices can permit absence on trial for what might be substantially the whole of the current renewal period without affecting the validity of the reception order. To summarise the application of the two codes to the facts of this case, even if the second reception order had survived earlier absences, it could not, under the Scottish Acts, have survived the period of absence from Dec. 23, 1932, to Apr. 21, 1933, and the crucial 5-years' period would never even have begun to run, while the point I have to decide would have been the same if the wife, instead of living with her sister for varying periods amounting in all to 346 days, had been permitted to be absent continuously for well over 4 years, and had lived with her husband throughout that time.

It may well be that Parliament was content to regard the subsistence of an order which would automatically be terminated by a break of even 28 days as sufficient to satisfy the test of continuity of care and treatment, but was not content so to regard an order which might be in abeyance for an indefinite period. However, assuming that this difference in the definition of care and treatment was deliberate in relation to the English and Scottish lunacy codes, and that the resulting anomalies were inevitable, I feel obliged to point out that a very anomalous position may arise in connection for example, with the Yarmouth Naval Hospital Act, 1931. This Act authorises the detention in the Yarmouth Naval Hospital of persons in the Royal Navy, the Royal Marines and the Reserves who are of unsound mind and are otherwise qualified within the Act. Orders for such detention are included in the definition of care and treatment in both the English and Scottish Divorce Acts. The

same "care and treatment" is given to naval personnel in need of it, whether their domicile be English or Scottish. Yet in the one case detention in pursuance of such an order is requisite, while in the other the mere fact that the warrant or order is in force is sufficient to satisfy the definition of continuous care and treatment. With reference to such persons, at any rate, there appears to be no particular reason, if the two phrases mean the same thing, why one or other of them should not have been selected for use in both Acts. However, I do not wish to lay too much stress on considerations arising from a comparison with the Scottish Act. On the wording of the Matrimonial Causes Act itself, I cannot bring myself to hold that the liability to be detained, if and when a reception order is called out of abeyance, is the same thing as actual detention under an order which is being enforced. I think that this can be tested by one or more illustrations derived from the facts of this case. So far as the medical superintendent was concerned, there was no "necessity" for the wife to be detained at all. Nothing could be done for her in the hospital beyond what he called "social treatment," and, if the wife was happier with her sister, the authorities, perfectly properly, were content that she should stay with her, if not indefinitely, at any rate, to quote Dr. Davie, "for a year, if need be, or more." There was never any medical necessity for her to return to the asylum. Such necessity as there ever was lay solely in the convenience of her sister. By sect. 55 (8), which I have quoted above, before the expiration of a fixed period of absence on trial, and *a fortiori* if no period has been fixed, any medical man can send a certificate to the visitors certifying that the patient's detention as a lunatic is no longer necessary. The certificate does not involve that the patient has recovered, but only that detention is unnecessary. Upon the sending of the certificate, the reception order ceases to be in force. The patient can no longer be retaken at the expiration of the period as if upon an escape. It does not matter how short the period of absence on trial was to be, or whether the medical superintendent agrees with the opinion or not, for there is no question of his being allowed to examine the patient and give a renewal certificate under the Lunacy Act, 1891, s. 7. As soon as a patient is out on trial, any medical man, however inexperienced in this subject, can bring a reception order to an end in this way. In a case like this, it does seem absurd that the question whether or not a patient, to whom the asylum authorities are prepared to allow more or less indefinite leave of absence on trial, is continuously under care and treatment may depend on whether or not some doctor sends to the visitors a certificate, with which, if it were sent, they would presumably be in complete agreement.

I have considered carefully whether any light is thrown upon the meaning of the words "detained in pursuance of any order" in the Matrimonial Causes Act, 1937, s. 3 (a), by sect. 3 (b), whereby, in certain circumstances, treatment as a voluntary patient under the Mental Treatment Act, 1930, is also deemed to be "care and treatment" within

the former Act. Seeing that treatment as a voluntary patient excludes the idea of detention, as distinct from reception, in the mental hospitals and other places specified in the Mental Treatment Act, 1930, s. 1 (1), it is arguable that, if Parliament was prepared to regard this as "care and treatment" within the Matrimonial Causes Act, it must have intended the detention mentioned in sect. 3 (a) to be construed liberally. However, it is to be observed that it is not any such treatment that is included in the definition, but only that "which follows without any interval a period of such detention as aforesaid." That is to say, it applies only to one of the limited class of patients who, being detained under a reception order, is capable of submitting himself for reception, without any interval, in one of the places specified in the Act, and without the necessity of keeping the reception order in force. The converse case is dealt with by the Mental Treatment Act, 1930, s. 2 (3), which prescribes the circumstances in which a voluntary patient may be detained under a reception order. For the purposes of the definition of "care and treatment," it seems to me to be immaterial how many times a transition is effected from treatment as a voluntary patient to detention in pursuance of a reception order, and *vice versa*, provided always that a spell of such detention occurs not less than 5 years before the petition, from which a continuous period of care and treatment can be reckoned. Yet if in a varied course of treatment the earliest detention occurs within the 5-years' period, the definition is not satisfied. Moreover, even if such detention occurs outside the 5 years, it seems to me to be at least doubtful whether the continuity would not be broken, for example, if, less than 5 years before the petition, a period of treatment as a voluntary patient within the meaning of sect. 3 (b) were, by virtue of the Mental Treatment Act, 1930, s. 2 (3), to be followed by a period of reception and detention as a temporary patient under sect. 5 of that Act, since such detention would not, in the first instance, at any rate, be in pursuance of any order: see the Mental Treatment Act, 1930, s. 5, and especially subsects. (1), (3), (4), and (9)-(13), and compare the Lunacy Act, 1890, s. 82, with the same section as modified by the Mental Treatment Rules, 1930, r. 47.

I have referred to these points in order to emphasise the arbitrariness of the definition of "care and treatment," which, in terms, is exclusive. In my opinion, this strictly limited reference to treatment as a voluntary patient serves rather to mark the contrast between the words "treatment" and "detention." If Parliament had intended to take as the test any kind of care and treatment under the Lunacy Acts, whether the spouse was a voluntary patient, a temporary patient, or a patient under a reception order, it would have been quite simple to say so. As Parliament has not chosen to say so, it is not for the court to legislate. Moreover, detention as a lunatic, not justified by the Lunacy Acts, gives rise to an action for false imprisonment: *Harnett v. Bond* (1). I am unable to see how a plaintiff, whatever other cause of action he might have,

could allege false imprisonment in respect of a period when he was, in fact, at large by permission. However that may be, I think that strong support for the view that periods of absence on trial are not periods of detention within the meaning of the Lunacy Acts is to be derived from the opinions of the noble Lords in *Harnett v. Bond* (1). In that case, the plaintiff was a private patient, and was ordered 28 days' absence on trial under sect. 55 (3) (b). The false imprisonment alleged was in respect of his being retaken during that period and his subsequent detention for a long period. The form of order for his absence is set out in the opinion of VISCOUNT CAVE, L.C., at p. 676. *Mutatis mutandis*, it would afford an excellent model for the guidance of the East Riding of Yorkshire. With regard to the power of retaking the patient under such an order, nothing turns on the distinction between a private patient in a licensed house and a patient in an asylum. In expressing the opinion that this power was capable of being exercised wherever the patient might be found, VISCOUNT CAVE, L.C., said, at p. 684 :

When once the patient is retaken the leave of absence order comes to an end, and he can be detained under the existing reception order.

In the same case, LORD DUNEDIN, summarising the facts, said, at p. 686 :

Mr. Harnett was detained in a private asylum under a reception order against which nothing has been said. He was then liberated for a period of 28 days on trial under a leave of absence order signed by two visiting justices, but with a proviso authorising the medical officer at any time during the 28 days to take back the patient if his mental condition required it. Being out of the asylum in virtue of the leave of absence order he of his own accord presented himself at the office of Dr. Bond. He saw Dr. Bond who, having identified his case on the file, knew that he had come from Malling Place. He considered him to be in a very excited state, and thought it would be well that Dr. Adam should see him. He telephoned to that effect, and a motor car with two attendants was sent to take him to Malling Place. Pending the arrival of the car Harnett was forcibly detained. For that detention it is admitted Bond had no legal justification.

Every word of this passage seems to me to be inconsistent with the notion that, while he was absent under the leave of absence order, the plaintiff was detained in pursuance of the reception order. LORD BUCKMASTER said, at p. 688 :

On Dec. 12, thinking the plaintiff sufficiently restored to justify his release upon a probation order, the plaintiff was permitted to leave the establishment in company with his brother. The brother, however, was not responsible for his safe keeping, nor was the plaintiff placed under his control.

That, in substance, is this case. Describing the legal effect of the release, LORD BUCKMASTER, said, at p. 690 :

... when once it be accepted that such an order is in the nature of an experiment to try whether a man is fit to be restored to complete liberty, it appears to me to follow that the powers conferred by the reception order, including complete control of the person named in the order, are merely in abeyance, and at any time if the custodian honestly thinks it is in the interest of the patient, the control can be resumed and the patient taken back.

There are other passages to the same effect, but it is unnecessary to multiply quotations. For these reasons, I hold that the plaintiff has

not established a case under the section, and the petition must, therefore, be dismissed.

Petition dismissed with costs.

Solicitors: *Bell, Brodrick & Gray* (for the petitioner); *Burton, Yeates & Hart* (for the respondent); *The Treasury Solicitor* (for the King's A Proctor).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

B NEW BRUNSWICK RAILWAY CO. v. BRITISH & FRENCH TRUST CORPORATION, LTD.

[HOUSE OF LORDS (Lord Maugham, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **October 17, 18, 20, 21, 24, 25, December 13, 1938.**]

C *Money—Covenant to pay on gold basis—Redemption of debenture—Payment of interest—Construction of bond—Construction of provision for payment of interest.*

Estoppel—Estoppel by record—Judgment in default of defence—Judgment upon one of a series of like debentures—Identity of debentures not pleaded in previous action.

D *Dominions—Debentures payable in London—Gold clause—Effect of Canadian legislation passed after date for payment—Federal Gold Clauses Obligations Act of Canada, 1937 (c. 37)—Gold Clauses Act of New Brunswick, 1937 (c. 45).*

Practice—Change of law after judgment and before appeal—Duty of the Court of Appeal—R.S.C., Ord. 58, rr. 1, 4.

E The defendants (the present appellants), a Canadian corporation, registered under the laws of New Brunswick, issued on Aug. 1, 1884, 6,000 first mortgage gold bonds of like amount, tenor, and date. The bonds were secured by a mortgage trust deed, and all became due on Aug. 1, 1934. The bonds stated that on that date the defendants for value received promised "to pay to bearer or registered holder thereof £100 sterling gold coin of Great Britain of the present standard weight and fineness at its agency in London, England, with interest thereon" F at 5 per cent. per annum, payable in London or, at the holder's option, at the defendants' office in New Brunswick. The interest coupon stated that the company would pay the bearer £2 10s. sterling at its agency in London, England, or at its office in New Brunswick, on Aug. 1, 1934. The plaintiffs (the present respondents), holders of 992 such bonds, claimed in respect of each bond the sum in sterling calculated on Aug. 1, 1934, then representing the gold value of £100 on G Aug. 1, 1884. The defendants contended that they were bound to pay only £100 sterling upon each bond, and interest upon the same basis. In an action between the same parties upon another of the bonds, the plaintiffs obtained judgment on Nov. 7, 1934, upon the gold basis now claimed, the defendants not having put in any defence to that action. The statement of claim in that action did not allege H that all the bonds were identical in their terms.

On Jan. 16, 1936, judgment was given in the present action in favour of the defendants. The plaintiffs appealed, but, before the appeal could be heard in the Court of Appeal, the legislature of New Brunswick, on Apr. 2, 1937, and that of Canada, on Apr. 10, 1937, both passed legislation affecting gold clause obligations:—

HELD: (i) the bonds were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of

money, the amount of which was to be measured by the value in sterling at the due date of 100 gold coins of Great Britain of the standard weight and fineness existing at the date of the bond.

(ii) such a construction was, however, inapplicable to the interest payments, because the words "with interest thereon at the rate of £5 sterling per centum per annum," contained no express reference to the gold clause obligation in the bonds.

(iii) although a contract in identical terms and between the same parties had already been construed by the court in the earlier action, the defendants were not estopped from raising any argument about the construction of the words relating to the interest payments, because the construction of the interest contract was something different from the adjudged construction of the contract in the earlier action, in which a default judgment was obtained against the defendants. A judgment by default is only an estoppel in respect of the matter directly decided, and the court should, as far as possible, only make declarations as to the construction of documents when the matter has been argued by counsel on each side.

(iv) the Canadian Act of 1937 was inapplicable to the present case, as, upon its proper construction, it did not affect the rights of an English creditor suing in England. It was unnecessary to consider whether the gold clause was "governed by the law of Canada."

Order of Court of Appeal ([1937] 4 All E.R. 516) *varied*.

[EDITORIAL NOTE.] Upon the gold clause point the House of Lords have followed their own decision in the *Feist* case (1), except that they have, upon the construction of the bond, held that payment on a gold basis did not extend to the provisions for the payment of interest. It will be noted that, in the case of the bonds here in question, interest was payable over a period of 50 years. Upon the estoppel point, it seems now to be settled that a party is not estopped by a default judgment except as to the matter directly decided. On this point the opinion of LORD WRIGHT is the most emphatic. Admittedly there are cases where a change in the law during an appeal will allow the Appeal Court to give effect to the altered law. The present case did not present circumstances in which an exhaustive exploration of this subject could be made, since it was clear that the Canadian legislation did not affect this case.

AS TO PAYMENT ON A GOLD BASIS, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 173, 174, para. 251; and FOR CASES, see DIGEST, Supp., Money, Nos. 17a-17k.]

AS TO ESTOPPEL BY JUDGMENT IN DEFAULT, see HALSBURY, *Hailsham Edn.*, Vol. 13, pp. 443-445, paras. 498-500; and FOR CASES, see DIGEST, Vol. 21, pp. 144-146, Nos. 83-97.

AS TO CHANGE OF LAW DURING PROCEEDINGS, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 122, 123, para. 241; and FOR CASES, see DIGEST, Practice, pp. 784, 785, Nos. 3474-3478. See also YEARLY SUPREME COURT PRACTICE, 1939, pp. 1256, 1257.]

Cases referred to:

- (1) *Feist v. Société Intercommunale Belge D'Électricité*, [1934] A.C. 161; Digest Supp.; 103 L.J.Ch. 41; 150 L.T. 41.
- (2) *R. v. International Trustee for the Protection of Bondholders Akt.*, [1937] A.C. 500; [1937] 2 All E.R. 164; Digest Supp.; 106 L.J.K.B. 236; 156 L.T. 352; *affg.*, [1936] 3 All E.R. 407.
- (3) *Henderson v. Henderson* (1843), 3 Hare, 100; 21 Digest 174, 276; 1 L.T.O.S. 410.
- (4) *Hoystead v. Taxation Comr.*, [1926] A.C. 155; Digest Supp.; 94 L.J.P.C. 79; 134 L.T. 354.
- (5) *Howlett v. Tarte* (1861), 10 C.B.N.S. 813; 21 Digest 146, 96; 31 L.J.C.P. 146.

- (6) *Performing Right Society, Ltd. v. Bray Urban District Council*, [1930] A.C. 377; Digest Supp.; 99 L.J.P.C. 116; 143 L.T. 97.
- (7) *Quilter v. Mapleson* (1882), 9 Q.B.D. 672; 42 Digest 696, 1111; 52 L.J.Q.B. 44; 47 L.T. 561.
- (8) *Stovin v. Fairbrass* (1919), 88 L.J.K.B. 1004; 42 Digest 707, 1241; 121 L.T. 172.
- A (9) *A.-G. v. Birmingham, Tame & Rea District Drainage Board*, [1912] A.C. 788; 42 Digest 762, 1878; 82 L.J.Ch. 45; 107 L.T. 353.
- (10) *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*, [1926] A.C. 94; Digest Supp.; 95 L.J.P.C. 33; 134 L.T. 335.

APPEAL from an order of the Court of Appeal (GREER, SLESSER and B SCOTT, L.JJ.), dated Nov. 22, 1937, and reported [1937] 4 All E.R. 516, ordering that the judgment of HILBERY, J., dated Jan. 16, 1936, and reported [1936] 1 All E.R. 13, whereby judgment was directed to be entered for the defendants (the present appellants), should be set aside, and ordering that judgment should be entered for the plaintiffs (the C present respondents). The facts and the arguments are set out in the opinions of their Lordships.

F. R. Evershed, K.C., and *Valentine Holmes* for the appellants.

H. A. H. Christie, K.C., *Cyril Radcliffe, K.C.*, and *Colin H. Pearson* for the respondents.

D

LORD MAUGHAM, L.C.: My Lords, the primary question for decision in this appeal is whether, as a matter of construction, the respondents, as holders of 992 5 per cent. first mortgage gold bonds issued by the appellants, are entitled to payment in London of such a sum in sterling as represents the gold value of the nominal amount of principal therein mentioned. There is a further question in relation to the interest payable in respect of such bonds. Several other important questions arise on the appeal, and in particular (i) whether the appellants are estopped by a judgment in a previous action between the same parties from disputing the right of the respondents to payment on the basis above stated as regards both the principal and the interest secured by the bonds, and (ii) on the assumption that the appellants are wrong on the questions of construction raised by the primary question, whether they have been exonerated by an Act of the Dominion legislature, which received the G Royal assent on Apr. 10, 1937, from their obligation to pay a larger amount of currency than the nominal amount specified by the bonds—that is, the sum of £100 sterling in respect of each bond, and interest at the rate of 5 per cent. on that sum—and that although the writ was issued, and the judgment of the trial judge was delivered, many months H before the Act of the Dominion Parliament was passed.

The facts must now be stated. The bonds are part of a series of 6,000 gold bonds of £100 each, all in the same form and of like amount and date, which were issued by the appellants over 50 years ago—namely, in Aug., 1884. The appellants are a corporation organised and existing under the laws of the province of New Brunswick, and the bonds

were issued under powers conferred by the New Brunswick and the Dominion legislatures. A number of the bonds were issued to the holders of certain gold bonds of a company called the New Brunswick Land and Lumber Co., Ltd., in exchange for those bonds, and the remaining bonds of the appellants' issue were sold in London. Each of the bonds is dated Aug. 1, 1884, and entitled first mortgage gold bond, with the figures £100 sterling on its face. The operative words are : A

The New Brunswick Railway Co. for value received hereby promises to pay to the bearer or registered holder hereof on Aug. 1, 1934, the sum of £100 sterling gold coin of Great Britain of the present standard of weight and fineness at its agency in the city of London England with interest thereon at the rate of £5 sterling per centum per annum payable semi-annually on Feb. 1 and Aug. 1 in each year in the said city of London or, at the option of the holder, at the office of the company in New Brunswick on presentation and surrender of the interest warrants or coupons hereto annexed as they severally become due. B

This bond is one of a series of 6,000 bonds of like amount, tenor and date, numbered from 1 to 6,000 inclusive and amounting in the aggregate to £600,000 sterling all equally secured by a first mortgage or deed of trust of even date herewith executed by the said company to the Central Trust Co. of New York as trustee covering the entire railway of the said company and all its lands and territory, rolling stock, equipment, rights, franchises, easements, privileges and appurtenances. The holder of this bond will also be entitled equally with the holders of each of the other bonds of said issue to the benefit to be derived from a sinking fund to be appropriated, derived and set apart from the sale of the lands of the said railway company for the redemption of said issue of bonds at the times and in the manner in said mortgage or deed of trust specified. C

This bond shall pass by delivery, unless registered in the name of the owner on the books of the company in New Brunswick, or wherever else the company may keep transfer books. After a registration of ownership, certified hereon by the transfer agent or officer of the company, no transfer, except on the books of the company, shall be valid, unless the last preceding transfer shall have been to bearer, which shall restore transferability by delivery ; but this bond shall continue subject to successive registrations and transfers to bearer, as aforesaid, at the option of each holder. D

Each of the bonds had interest coupons annexed thereto in this form : E

New Brunswick Railway Co. will pay the bearer £2 10s. stg., at its agency in the city of London, England, or at its office in New Brunswick, on the first day of being 6 months' interest on its first mortgage bond No.

The coupon numbered 100 for 6 months' interest payable on Aug. 1, 1934, was at the date of the writ annexed to each of the respondents' bonds. The other coupons had been detached. None of the bonds held by the respondents has been registered, and no evidence was given that the appellants ever kept transfer books relating to the issue, or registered any of the bonds. The first mortgage or deed of trust referred to in the bonds was executed by the appellants in favour of a well-known trust company of New York as trustee. The deed of trust was dated Aug. 1, 1884, and contained a mortgage of the railway belonging to the appellants, together with the usual provisions for the enforcement of the security in certain events. F G

It is evident that the principal money secured by each of the bonds was to be paid in London, and that the amount so payable on Aug. 1, 1934, was of such a sum as would represent the price in London in sterling, calculated as on that day, of 12,327·447 grains of gold of the standard of fineness specified in the Coinage Act, 1870, Sched. I. On H

the other hand, the interest expressed to be "at the rate of £5 sterling per centum, per annum," was payable on Feb. 1 and Aug. 1 in each year, either in London or, at the option of the holder, at the office of the appellants in New Brunswick, on presentation and surrender of the coupons which were annexed to the bond. The security vested in the

A trustee consisted largely of immovable property in New Brunswick, and it is plain that the law of New Brunswick would apply to any proceedings for the purpose of realising the security.

It is now necessary to state the unusual circumstance which gives rise to the question of estoppel. On Aug. 20, 1934, the respondents

B commenced an action in the King's Bench Division of the High Court of Justice for the purpose of enforcing payment of the principal moneys and interest secured by a bond which they had acquired bearing the number of 3,300. They had already acquired the 992 bonds above-

C mentioned, and it is not clear why no reference was made to those bonds either in the writ or in the statement of claim. Leave was obtained to serve the writ upon the appellants out of the jurisdiction, but they did not enter an appearance in the action. On Oct. 13, 1934, the respondents

D filed a statement of claim, by which they claimed (as they did in the writ) a declaration that, upon the true construction of the bond—namely, the bond number 3,300—they were entitled to receive from the

E defendants (a) by way of principal, such a sum as represented the price in London in sterling, calculated as on Aug. 1, 1934, of 12,327·447 grains of gold of the standard of fineness specified in the Coinage Act, 1870, Sched. I, and (b) by way of the half-yearly interest due thereunder on that date, a sum equal to $2\frac{1}{2}$ per cent. of the amount specified in (a), less income tax. They claimed also payment of the sums due on the footing of the declaration with interest. The respondents filed a

F motion for judgment in the same terms as the claim for relief in the statement of claim, and they obtained the judgment of the court on Nov. 7, 1934. That judgment (which I shall call the default judgment) contained a declaration as to the true construction of the bond referred to in the statement of claim in the terms set out therein, and it was further adjudged that the respondents recovered against the appellants the sum of £183 3s. 5d. and costs to be taxed. The judgment states

G that the court heard counsel for the plaintiffs, and that no one appeared for the defendants. It is this default judgment which is set up by the respondents as an estoppel which prevents the appellants from questioning the construction of the 992 bonds, either as regards principal or as regards interest.

H In Mar., 1935, the respondents presented to the appellants' agents in the city of London the 992 bonds and the interest coupons remaining annexed thereto, being coupons in respect of the half-yearly interest due on Aug. 1, 1934, and they claimed payment of a sum calculated in accordance with the declaration made in the first action. Such payment was refused, and the writ in this action was issued on Mar. 20, 1935.

This action was tried by HILBERY, J., on Dec. 18, 19, 1935. On Jan. 16, 1936, the judge delivered his reserved judgment. He held that, upon the true construction of the bonds, the contract contained therein was one for repayment in money of a loan, and that the appellants were entitled to discharge their obligation by payment of £100 sterling for each bond, and interest at the rate of 5 per cent. calculated in sterling. In the view of the judge, the decision of this House in *Feist v. Société Intercommunale Belge D'Électricité* (1) was distinguishable. The judge also held that the appellants were not estopped by the judgment in the first action, upon the ground that each of the bonds was a separate contract, and gave a distinct cause of action to each bearer. The respondents had not claimed specifically by way of alternative claim, either in the writ or in the statement of claim, payment of the amounts which would be due to them on the footing of the construction adopted by the judge, and accordingly it was adjudged that the respondents should recover nothing against the appellants, though the latter were ordered to pay the costs of the action. The respondents gave notice of appeal on Feb. 26, 1936. The hearing was postponed pending the decision of *R. v. International Trustee for the Protection of Bondholders Akt.* (2) by this House, in order that the Court of Appeal should have the assistance of the opinions in that case, which raised a somewhat similar point. In the meantime—namely, on Apr. 10, 1937—there was passed by the Parliament of the Dominion of Canada the Act entitled the Gold Clauses Act, 1937, which it is necessary to set out in full :

1. This Act may be cited as the Gold Clauses Act, 1937.

2. The expression "gold clause obligation" in this Act means any obligation heretofore or hereafter incurred (including any such obligation which has, at the date of the commencement of this Act, matured) which purports to give to the creditor a right to require payment in gold or in gold coin or in an amount of money measured thereby, and includes any such obligation of the government of Canada or of any province.

3. In the case of any gold clause obligation payable in money of Canada, tender of currency of Canada, dollar for dollar of the nominal or face amount of the obligation, shall be a legal tender and the debtor shall, on making payment in accordance with such a tender, be entitled to a discharge of the obligation.

4. In the case of any gold clause obligation governed by the law of Canada payable in Canada or elsewhere, in money other than money of Canada tender of the nominal or face amount of the obligation in currency which is legal tender for the payment of debts in the country in the money of which the obligation is payable shall be a legal tender and the debtor shall, on making payment in accordance with such a tender, be entitled to a discharge of the obligation.

5. Any payment in respect of a gold clause obligation made before the commencement of this Act, which, if made hereafter, would entitle the debtor to a discharge, shall be deemed to have discharged the obligation.

6. Every gold clause obligation is hereby declared to be contrary to public policy and no such provision shall hereafter be contained in, or made in respect of, any obligation.

7. The provisions of this Act shall have full force and effect notwithstanding anything contained in any other statute or law.

On May 24, 1937, the Court of Appeal, upon the application of the present appellants, gave them leave to amend their defence so as to raise the question whether they were not, by reason of the Canadian legislation, entitled to discharge their obligations by paying the nominal amount thereon. Leave was also given to adduce further evidence on

the hearing of the appeal. The appeal was heard in July, 1937, and the judgments of the Court of Appeal were delivered on Nov. 23, 1937. The court unanimously allowed the appeal. They held that, upon the true construction of the bonds, the *Feist* construction was applicable both as regards the principal moneys and as regards the coupons due on Aug. 1, 1934, and they made the appropriate declarations. They also ordered that, upon the surrender of the bonds mentioned in the statement of claim, with the interest coupons, judgment was to be entered for the respondents for the sum of £182,044 8s. (being £162 10s. 9d. in respect of principal, and £3 0s. 11d. in respect of interest due on Aug. 1, 1934, and a further sum in respect of interest from Aug. 1, 1934, to the date of the judgment in respect of each of the bonds). It should be added that, in addition to the decision that the *Feist* construction was applicable, the court held that the appellants were in any event estopped by the default judgment given in respect of bond No. 3,300 from contending that the bonds and interest coupons the subject-matter of the present action ought to be construed in any way other than that in accordance with the declaration above-mentioned. All three Lords Justices also held that "the proper law of the contract" contained in the bonds and interest coupons was Canadian, but that the clause providing for payment in London must be interpreted and have effect by reference to the law of England, and that the obligations of the appellants in regard to such payment were not affected by the Canadian Act. They also held that the plea of estoppel could not avail the respondents as regards any defence which might be based upon the Canadian legislation, since that legislation was subsequent to the date of the default judgment. SCOTT, L.J., mentioned, however, a final point which, in his opinion, compelled the court to disregard the two Canadian statutes. They were passed, he said, long after the action had been brought in the King's Bench Division and judgment given in the trial court, and, in his opinion, the Court of Appeal ought to give the judgment which HILBERY, J., ought properly to have given—namely, a judgment for the plaintiffs, instead of for the defendants. If that had been done, the bondholder's right, instead of being one based on contract, would have passed into a judgment of an English court, creating a new right, and one to which a subsequent Canadian statute could have no application.

My Lords, on the primary question of the true construction of the bonds, none of your Lordships entertains, I think, any doubt. It is clear that the gold clause contained in the bonds was intended as a clause to protect those who acquired the bonds against a depreciation of the currency in the province of New Brunswick, and, since the decision of this House in *R. v. International Trustee for the Protection of Bondholders Akt.* (2), it is not possible to confine the decision in the *Feist* case (1) to contracts not only containing a gold clause but also possessing indications in the same sense as those which were contained in the *Feist* case (1). This view has been accepted by judicial tribunals in a number

of countries, and I have myself no doubt that the present case is one to which the *Feist* construction should be applied, so far as regards the principal sums secured by the bonds.

On the other hand, I do not think that a construction on the lines of the *Feist* decision (1) ought to be adopted unless the so-called gold clause obligation is expressed in clear language, and, for myself, I do not think that this can be asserted in reference to the interest payments. The phrase used is "with interest thereon at the rate of £5 sterling per centum, per annum," and one naturally asks oneself the meaning of the word "thereon." Grammatically, it seems to refer to the £100 sterling, *simpliciter*, since, except on that footing, it is impossible to ascertain at any particular date between 1884 and 1934 how much would become payable in English currency in respect of the £100 sterling. That amount became ascertainable on Aug. 1, 1934. At any previous date, it might be a considerably smaller sum, or, in possible events, a larger one. Moreover, the coupon, which is a coupon payable to bearer either in London or in New Brunswick, states that the New Brunswick Railway Co. will pay to bearer £2 10s. sterling, without any addition of a gold clause. It may well have been thought convenient to have a definite sum fixed in sterling for the payment half-yearly of the interest due in respect of the coupons. There is no doubt a possible method of avoiding this conclusion—namely, by reading the word "sterling" in the promise to pay interest as meaning "sterling as aforesaid," as suggested by SCOTT, L.J., in the Court of Appeal. I am unable to come to the conclusion that, in the circumstances, this is a legitimate addition, as a matter of construction, to the terms of the bonds, and, accordingly, I have come to the conclusion that the *Feist* construction is not applicable to the interest. It follows that the amount due, apart from other considerations which will next be dealt with, is somewhat smaller than the amount held to be due by the appellants to the respondents in the judgment of the Court of Appeal of Nov. 23, 1937.

On the question of estoppel by the default judgment of Nov. 7, 1934, as regards the bond No. 3,300, it will be observed that, accepting the *Feist* construction as regards the principal, the estoppel, if allowed, can have effect only as regards the final sum payable for interest. The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties, or persons claiming under them. In my view, however, the doctrine cannot be made to extend to presumptions or probabilities as to issues in a second action which may be, and yet cannot be, asserted beyond all possible doubt to be identical with those raised in the previous action. In the earlier action here, the only relevant issue was as to the true construction of the only bond then sued upon, and an allegation that other bonds of the same issue were in precisely the same form would have

been irrelevant and improper. In fact, however, the statement of claim contained no such allegation. Nor is it true to assert that all the bonds of such an issue are necessarily in the same terms. The issue of construction in the second action could, indeed, be proved in the second action to be *similar* to that decided in the first, but it related to a different cause of action, based on other bonds, and could not be asserted to be the same issue. Moreover, it is a matter of common knowledge that such bonds are often issued at different dates and in different countries, matters which might well have a possible bearing on their true construction. The defendants in the first action, in special circumstances, might themselves have been estopped from contending as against the plaintiffs for the more limited construction of bond No. 3,300 then sued upon, while there might have been no such estoppel as regards the 992 bonds. Finally, it is worth observing that, in the case of bonds to bearer, little would be gained, as regards preventing useless litigation, by upholding the estoppel claimed here by the respondents, since such an estoppel would not avail against some bearer of the bonds other than the appellants, who would, therefore, only have to sell them in the market to a third party in order to defeat the estoppel.

My Lords, I desire to make it plain that I am not desirous of questioning the general rule on the subject of *res judicata* laid down by WIGRAM, V.-C., in *Henderson v. Henderson* (3), at p. 114. His statement of the rule was cited and approved by the Judicial Committee in *Hoystead v. Taxation Comr.* (4), at p. 170. It is, however, to be noted that WIGRAM, V.-C., was stating the rule in general terms, and he qualified the rule by the exception of special circumstances or special cases. I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in, and contested, the first action, but the judgment in that action, limited in form to a single bond, was pronounced in default of appearance by the defendants. In my view, not all estoppels are "odious," but the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped, not merely in respect of the actual judgment obtained against him, but also from defending himself against a claim for a much larger sum, on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action. My Lords, I think that there is much to be urged in favour of the observation made by WILLES, J., in *Houlett v. Tarte* (5), though it may have been a little too widely expressed. He said, at p. 827 :

It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action.

In my opinion, we are at least justified in holding that the estoppel in

such a case must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment. If that be the principle, the appellants are not, in the present case, estopped from raising any contention they think fit in an action on the 992 bonds.

A

I think it right to observe that it is, in my view, undesirable that judges should make declarations as to the true construction of documents on motions for judgment in default of defence. It has not, I believe, been the practice to do so in the Chancery Division for a good many years. As far as possible, the court should make such declarations only when the matter has been argued by counsel on each side, and is then the subject of adjudication by the judge.

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If we now approach the consideration of the Dominion Act respecting gold clause obligations (1 Geo. 6, c. 33), it is, I think, evident that three questions may arise upon it. First, upon its fair construction, does it purport to alter or affect the rights of litigants in a foreign country, meaning thereby any country other than Canada? Secondly, assuming that the answer is in the affirmative as regards "obligations governed by the law of Canada," can sect. 4 of the Act have any effect in regard to an action to enforce the obligation commenced in a foreign country before the Act came into force? Thirdly, is the bond in the present case within the terms a "gold clause obligation governed by the law of Canada"? My Lords, the Canadian Act is in some respects curiously worded. Apart from sect. 6, it contains nothing purporting directly to alter the obligation of either party under the contracts containing gold clause obligations which are being dealt with. Sects. 3 and 4 are dealing mainly with the questions of legal tender, and each provides that legal tender, followed by payment in accordance with the section, shall be a good discharge. Sect. 3 deals with obligations to pay in money of Canada, while sect. 4 deals with obligations to pay in money other than money of Canada. Neither section entitles the debtor in terms to a discharge unless he makes a legal tender as well as a payment in accordance with it, and, while it is no doubt true that the legal tender and the payment may be practically simultaneous, the language used points strongly to the conclusion that for some reason or other the legislature has abstained from enacting that the contracts in question are to have effect as if the gold clause obligations were omitted. This can be illustrated further by an examination of sect. 4. It relates to cases where the sums due are payable "in Canada or elsewhere," but in some foreign currency. Let us first take a bond for payment in Canada of, say, German marks. The section is providing that, if the nominal amount of the bond is (say) 100 marks, a tender of 100 marks in Canada shall be a legal tender, and, if followed by payment of 100 marks, will be a good discharge. This is easy to understand, though unusual, for, generally speaking, if the debtor owes 100 German marks in Canada, he would

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discharge his debt in Canadian currency equal at the current rate of exchange to 100 German marks. It is to be remembered that German marks may not be procurable in Canada, yet the section only applies, in the case I am dealing with, if the legal tender in German marks can be made. Tender in Canadian dollars will apparently be of no avail.

- A Now let us take the other case, where the bond is payable in (say) Berlin in German marks. Does the section apply so as to provide what is to be legal tender in Germany, and what is to be a discharge in a German court? It is well known that in England a promise to pay money is not discharged by a mere tender of the money, but such a tender, if a
- B legal one, coupled with continued readiness to pay the debt, has the effect both of preventing any claim for subsequent interest and of entitling the debtor to the costs of an action to recover the debt of the creditor, provided that he complies with the applicable rules of court: HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 7, p. 197, para. 276 *et seq.* I
- C am of opinion that the questions that arise as to the validity or form of a tender, or the advantage of making one in a particular forum, are questions of procedure for the *lex fori*. There may well be special rules in different countries. For example, in this country, the rules of court require payment into court with a plea of tender. I cannot think that
- D the legislature of Canada was attempting to alter the course of procedure in any country except Canada. The result is that, in my opinion, sect. 4 must be confined, upon its true construction, to cases where the action to recover the amount due is brought in Canada, which would be a not uncommon case, and is not intended to have any application elsewhere.
- E By sect. 6, it is declared that every gold clause obligation is contrary to public policy. That must clearly mean contrary to the public policy of Canada. It cannot be that the section means that all bonds with a gold clause issued in the past in Canada are *ipso facto* void, still less that bonds issued abroad with such a clause are necessarily void
- F *ab initio*. If it were so, sects. 3, 4 and 5 would be meaningless, and, moreover, such a provision as to the past might well expose the companies and others who have issued such bonds payable at a future date to immediate actions for money had and received. It would seem that sect. 6 is confined to the future. In my opinion, it does not affect the present
- G case.

- My Lords, I am of opinion that the second question I have stated above in relation to the Canadian Act must also be answered in the negative. Sect. 4, as I have pointed out, is framed in legal terms. It requires a legal tender of the nominal or face amount of the obligation in a specified
- H currency. In my opinion, it is too late to make such a tender after the claim has been repudiated by the debtor and the repudiation has been accepted by the issue of a writ in a foreign jurisdiction. The matter has then passed into the domain of the court. A court of law must, of course, obey its own legislature acting within its jurisdiction (see for a parallel case *Performing Right Society, Ltd. v. Bray Urban District Council* (6));

but there are various limits to the powers of every legislature as regards things to be done or not to be done abroad. I am of opinion that such a statute as is now in question cannot be held to diminish or destroy the rights of an English creditor, and, it may be added, without compensation, after he has commenced an action in this country. *A fortiori* is such a statute incompetent to affect the course of justice here after trial and judgment. A Court of Appeal ought, generally speaking, to give the judgment which the trial court should have given, and I can see no reason for an exception to that general rule in the present case.

My Lords, having come to the conclusion, for the reasons stated, that the Canadian Act of 1937 has no application in the present case, it is not necessary to deal with the remaining question—namely, whether the bond is, or contains, a gold clause “governed by the law of Canada.” It would probably be necessary, in dealing with that question, to decide whether “the proper law of the contract,” if the phraseology of Professor Dicey is adopted, is Canadian or English, or, as I should prefer to state it, whether the essential validity of the contract embodied in a bond, including its mode of performance, ought to be determined by Canadian or English law. The answer would depend on the view taken in this particular case as to the intention, or presumed intention, of the parties. Opinions on the matter may differ. Since your Lordships are, as I understand, agreed that the appeal must fail (except as to the interest payment) on other grounds, I think it would be unwise for this House to express a final opinion on this point, and, for my part, I propose to abstain from dealing with it in any way. My Lords, in view of the above considerations, I think that the decision of the Court of Appeal was right except as regards the final coupons for interest. I think that the appeal should succeed as to the final coupons, but should be dismissed in other respects. The costs should be paid by the appellants.

LORD THANKERTON: My Lords, I have had the privilege of considering the opinion just delivered by LORD MAUGHAM, L.C., and the opinions about to be delivered by my noble and learned friends. In the first place, I agree that, as regards the principal sums, the gold clause in the bonds here in suit should be construed according to what may be conveniently called the *Feist* construction, but I think that the clause as to interest payments is not subject to that construction. In the second place, I agree, for the reasons stated by my noble and learned friends, that the plea of estoppel by reason of the default judgment dated Nov. 7, 1934, is ill-founded. In the third place, as regards the Canadian Gold Clauses Act, 1937, I agree with my noble and learned friends LORD RUSSELL OF KILLOWEN and LORD WRIGHT that, apart from sect. 5, which is not material to the present case, the Act does not operate retrospectively, and, in accordance with the views expressed by them, I would hold that the Act is irrelevant in this case, either (a) on the ground that the decision of this House ought to express the judgment

that should have been given on Jan. 16, 1936, when HILBERY, J., gave judgment, long prior to the passing of the Gold Clauses Act, or (b) on the ground that, prior to such enactment, liability on the bonds had been repudiated by the appellants, and they were being sued in respect of such repudiation, whereby it was no longer open to them to tender payment in satisfaction of the repudiated obligations.

My Lords, in this view, it becomes unnecessary to consider further the construction of the Gold Clauses Act, including the question as to whether the gold clause obligation in these bonds is "governed by the law of Canada," or to consider what is the proper law of the contract embodied in these bonds. On these matters, I express no opinion. I agree with the motion proposed by LORD MAUGHAM, L.C.

LORD RUSSELL OF KILLOWEN: My Lords, as to the construction of these bonds, so far as regards the principal moneys payable thereunder, I feel no doubt but that the *Feist* construction must be applied. One may well repeat what was said in the *Bondholders* case (2), at p. 556—namely, that, while the features here pointing to the *Feist* construction are fewer and less powerful than in the *Feist* bonds, uniformity ought to prevail in regarding gold clauses as clauses framed for the purpose of protecting lenders against depreciation of currency, and construing them accordingly. As SCOTT, L.J., has pointed out in his judgment in the present case, the question depends primarily on the wording of the alleged gold clause itself.

As regards the interest payable under these bonds, the matter stands otherwise. Each coupon provides for payment of a definite sum—namely, £2 10s. sterling. There is no reference to gold in the coupon. The provision as to interest in the bond is for payment of interest "thereon" at the rate of £5 sterling per annum. Again there is no reference to gold. Nor is it permissible to do what SCOTT, L.J., has done—namely, to read "sterling" as meaning "sterling as aforesaid" and so incorporating a reference to gold—for the reason that it would be impossible to ascertain on any Feb. 1 or Aug. 1 (except Aug. 1, 1934) what would be the amount of the principal moneys upon which interest was payable. To calculate the amount of interest payable during the currency of the bond would be impossible. It must, therefore, necessarily follow that the provision in the bond for interest, and the coupons, must be regarded as provisions for the payment of fixed amounts in currency—namely, £2 10s. every half-year. A marked distinction has been drawn between principal and interest in this respect, just as another equally marked distinction has been drawn between them in that the principal is only payable in London, whereas interest is payable either in London or in New Brunswick.

As a result of these views on construction, it follows that the question of estoppel by the judgment in the 1934 action can only arise in regard to interest. That judgment was entered for the plaintiffs in default of

appearance by the defendants. The parties were the same as the parties to the present action. The action was brought to enforce payment of gold bond No. 3,300 upon the footing that the *Feist* construction applied as to both principal and interest. By the default judgment, it was declared that, upon the true construction of that bond, the plaintiffs, as holders thereof, were entitled to recover sums for principal and interest upon that footing, which, so calculated, amounted altogether to a sum of £183 3s. 5d. This sum it was adjudged that the plaintiffs should recover against the defendants with costs to be taxed. A

My Lords, numerous authorities upon this question of estoppel were cited to us, but, after considering them with care, I can find none which would justify us in adopting the view, much less compel us so to do, that the doctrine applies so as to estop a defendant (against whom a default judgment has been obtained based upon a particular construction of one contract) from raising as a defence, in contesting a subsequent action on a different contract (but couched in the same or similar language), that the construction of that contract is something different from the adjudged construction of the other contract. It is true that in the judgment of the Judicial Committee in *Hoystead v. Taxation Comr.* (4) the following passage occurs, at p. 170 : B C

It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. These, no doubt, are wide words, but they relate to a case of estoppel by a judgment in contested proceedings, and I am not prepared to extend them to the case of a default judgment on a claim under contract A, followed by an action under a similarly worded contract B. I would only add that I agree with what LORD MAUGHAM, L.C., has said as to the undesirability of making declarations as to the construction of documents except after arguments on behalf of all persons interested. D E

As regards the Gold Clauses Act, 1937, I have come to the conclusion that, in the circumstances of this case, it has no application to the bonds here in question. It was assented to on Apr. 10, 1937. Long before its enactment, liability on the bonds according to their true construction had been repudiated by the appellants. The respondents issued their writ on Mar. 20, 1935, and ought to have obtained judgment on Jan. 16, 1936, and to have thereby acquired a new right in which the contractual right would have merged. The Act is not very happily worded, but what it purports to do is to provide as from Apr. 10, 1937, a special way of fulfilling certain then-existing obligations by tender and payment as therein mentioned. By that time, however, the appellants were incapable of tendering payment in satisfaction of their contractual obligations under these bonds. They had repudiated those obligations, and were being sued. They could only tender damages. I do not forget that the definition of "gold clause obligation" in sect. 2 includes an obligation which has matured, but, in my opinion, a matured obligation, while it F G H

includes a bond due but not presented for payment, or a mortgage debt due but not called in, does not include a repudiated obligation for the fulfilment of which tender of payment has become impossible. The Gold Clauses Act, 1937, is, accordingly, no obstacle to the respondents. This view renders it unnecessary to consider whether these gold clause obligations are "governed by the law of Canada," within the meaning of the Act, a question which would involve a decision as to what in this case is "the proper law of the contract." As to that, I express no opinion. In the result, I would allow this appeal, but only in regard to the matter of interest. The order of the Court of Appeal should be varied by substituting therein for the words and figures "a sum equal to 2½ per cent. of the amount specified in (A) above" the words "the sum of £2 10s.," and by substituting for the sum "£182,044 8s." the sum of £181,502 18s. 8d.," and for the sum of "£3 0s. 11d." the sum of "£2 10s." I agree that, notwithstanding this variation of the order appealed from, the appellants should pay the costs of the appeal to your Lordships' House.

LORD WRIGHT: My Lords, this appeal, which relates to the claim in respect of 992 bonds issued by the appellants on Aug. 1, 1884, and described as first mortgage gold bonds payable Aug. 1, 1934, gives rise to various questions which call for separate discussion. The first relates to the true effect of the stipulation as to the amount of the bond, which is in identical terms in each one of those in question. I agree with the Court of Appeal, who reversed the trial judge, that this clause is governed, as regards the principal obligation, by the same construction as that applied by this House to the obligation in *Feist v. Société Intercommunale Belge D'Électricité* (1), which was in effect that the bonds were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money, the amount of which was to be measured by the value in sterling at the due date of 100 gold coins of Great Britain of the standard weight and fineness existing at the date of the bond. The sum of £100 sterling in a case like this is sometimes described as the nominal or face amount of the bond. This description, though convenient, is not accurate, because £100 only defines the sum due so long as English sterling should remain equal in value to the stipulated gold coin. If sterling should depreciate, as it has done, relatively to the specified gold coin, £100 merely provides a measuring point or yardstick from which to determine how many units of currency will have to be paid to correspond to the gold value at the due date. Thus, in the present case, the bond, according to its tenor, could be discharged only by payment of something like £160. In effect, the gold clause aimed at protecting a creditor against the risk of depreciation of the currency, and is particularly important in the case of long-term obligations. That is in substance the effect of the *Feist* construction, which has since been applied in *R. v. International Trustee for the Protection of Bondholders*

Akt. (2). The clause seems to me to be one which has been adopted in business and financial affairs with a clear understanding of what was meant, though the language is not precisely accurate. The clause seems to have been in common use since about 1870, in substantially the same form, though with minor variations. I think that the *Feist* construction should prevail here. I note in passing that the interest payments are not, as will be explained later, subject to the gold clause provision, and hence it is not open here to invoke an argument relied on in the *Feist* case (1)—namely, that, while the interest was expressed to be payable in gold coin, that was impossible in fact, as there were not gold coins corresponding to the fractions of a pound. The same argument was also available in the *Bondholders* case (2). However, I do not regard that feature as essential to the *Feist* construction, which depends on broader considerations.

The next question is whether an Act of the Parliament of Canada—namely, the Gold Clauses Act, 1937—applies to these bonds, and, if so, with what effect. There was a similar Act of the New Brunswick Parliament which has not been separately discussed. In the Court of Appeal, important and difficult questions were examined as to whether the bonds were governed by Canadian law and as to whether the Act applied to payment in this country in discharge of the bonds. I desire to reserve my opinion on these questions, which are not material in this appeal, so that anything I might say here would be merely a matter of observation. I reserve my opinion, because, whatever view is taken of the general effect of the Canadian Act, the matter of the Act can, and should, be disposed of in this case on a point briefly stated by SCOTT, L.J., at the end of his judgment as a matter which would, in any event, have compelled him to disregard the change in the Canadian law. To deal with the question, certain dates must first be stated. The writ in the action was issued by the respondents as plaintiffs on Mar. 20, 1935. On Jan. 16, 1936, HILBERY, J., gave judgment for the appellants, dismissing the action. The claim was for a declaration claiming in effect that the *Feist* construction applied to the gold clause. The judge rejected that construction. He made no order on the claim for payment in accordance with that construction, except in the sense that he adjudged that nothing should be recovered by the respondents. The Canadian Act became law on Apr. 10, 1937. On June 2, 1937, the appellants, by leave of the Court of Appeal, delivered an amended defence setting up the Act. The Court of Appeal delivered judgment on Nov. 22, 1937, reversing the judge, applying the *Feist* construction to the bond, and treating the Canadian Act as not applying. The objection raised by SCOTT, L.J., was that, as the Act was passed after the judgment in the King's Bench Division, and as judgment there should have been entered for the respondents, the judgment should be thought of as if HILBERY, J., had given judgment for the respondents instead of for the appellants. In substance, I think that this objection should receive effect, and that, for the purposes of these

proceedings, the Canadian Act or Acts cannot apply, and that for that reason the decision of the Court of Appeal was right. It would certainly seem hard that the respondents should lose their rights merely because the judge had erroneously construed the bond. The matter, however, must be examined more precisely.

A The powers of the Court of Appeal depend on the rules of procedure defined in the Rules of the Supreme Court, of which the relevant rule is R.S.C., Ord. 58, rr. 1, 4. The material words of r. 1 are as follow :

All appeals to the Court of Appeal shall be by way of rehearing. . .

The material words of r. 4 are :

B The Court of Appeal shall have power . . . to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.

Apart from these last words, it would seem clear that the Court of Appeal is to rehear the case and to give the judgment which the judge appealed from ought to have pronounced. This obviously would shut out any change of law between the trial and the appeal. However, the last words, " to make such further or other order as the case may require,"

C have to be considered. The Court of Appeal has power to admit, under strict conditions and limitations, further evidence, and, if it does so, that

D may necessitate it making a different order from that of the judge. Again, it is clear that in certain cases a change in the law since the trial may have to be regarded by the Court of Appeal. This has been done in various reported cases. In particular, this course has been followed where the change in the law has given to the court a power or discretion

E to grant remedies or rights to relief which were not within its competence at the date of the trial. Such a case was *Quilter v. Mapleson* (7), and also *Stovin v. Fairbrass* (8). In the latter case, the power to grant an

F order for possession under the Rent Restriction Acts had been enlarged since the original hearing, and the Court of Appeal gave relief accordingly. Similarly, an injunction granted at the hearing may be discharged on appeal if the facts have changed, as in *A.-G. v. Birmingham, Tame & Rea District Drainage Board* (9). LORD GORELL in that case said, at p. 802 :

. . . the Court of Appeal was entitled to make such order as the judge could have made if the case had been heard by him at the date on which the appeal was heard.

G I respectfully venture to think that such language is intended not to be taken apart from the context in which it was used by the noble and learned Lord. In *Performing Right Society, Ltd. v. Bray Urban District Council* (6), the Privy Council gave effect to an Act of the Irish Free State legislature which had been passed after the Court of Appeal in

H Ireland had given judgment. This Act provided that certain copyrights which the Court of Appeal had negatived should be deemed to subsist, and always to have subsisted, but that no remedy or relief should be recoverable in respect of any such copyright. The Judicial Committee advised that the appeal should be allowed to the extent of upholding

the copyright, but made no order as to remedy or relief. The Act there in question was clearly retrospective, and intended to affect pending actions.

It must always be a question in each case whether an Act can be construed as having such effect. In the case of the Canadian Act, I cannot find that any such intention is evinced. The Act speaks as at Apr. 10, 1937. It states in terms (sect. 2) that it applies to any such obligation which has, at the date of its commencement, matured, but I see no reason to extend that to an obligation which has not only matured, but at the material date has also been the subject of a judgment, and is the subject of a pending appeal. Sect. 6 of the Act is not directly relevant in this connection, but, in so far as it goes, is consistent with the view that the Act is not intended to reopen transactions. It may be that the section is only inserted *ex abundante cautela*. In my opinion, where a statute interferes with vested rights in this manner, it is not *prima facie* to be construed as having the effect claimed by the appellants here. I think that the presumption is all the other way, and I do not think that the section should be construed as requiring, or, indeed, entitling, the appellate court to give any other judgment than that which the judge ought to have given. I think that the statute should be treated in these proceedings as inapplicable.

Mr. Cyril Radcliffe has pressed a further argument, based on the terms of sect. 4. This is that, at the date of the appeal, the conditions of the section could not be fulfilled. When the appellants repudiated the contract by refusing to pay on the basis of the *Feist* construction, and the respondents accepted that repudiation by issuing the writ, then he argued that the condition postulated by sect. 4—namely, the making of a legal tender of the debt in accordance with the terms of sect. 4—was no longer available, and hence the section could not come into effect after the Act became law. I agree with this argument, but I do not need to base my decision upon it, as the first ground I have stated is sufficient. For these reasons, I think that the appeal should be dismissed, so far as regards the principal sum.

There remains a separate point on the interest. The Court of Appeal held that the interest payments were on the same footing as that of the principal sum, and were payable on the gold basis. SCOTT, L.J., said that he construed the word "sterling" as meaning sterling as aforesaid. I cannot accept this re-writing of the words of the obligation. The contrast between the language used in respect of the principal sum and that used in respect of the interest is definite. If it had been intended to apply the gold obligation to the interest, that should have been done by precise words, as was done in *Feist's* case (1) and in the *Bondholders* case (2). The court would have no right to read these words in, even if it thought that principal and interest should, for practical reasons, stand on the same footing. However, I do not so think. The effect of the gold obligation is that the measure may

vary from time to time with changes in the ratio of value between gold and currency, and the sum finally due on the maturity of the bond cannot be fixed until the due date. The parties may have thought it simpler to avoid all such complications in respect of the obligations, recurring twice a year throughout the currency of the bond, to pay interest and to fix the interest once for all at the precise sum in sterling which is expressed. It is, however, contended that the appellants are estopped from raising this point, or relying on this construction, because of a judgment obtained against them in default of appearance in an action brought by the respondents on bond No. 3,300, which was a bond of the same series, but not one of the 992 bonds which are the subject of this action. In the default judgment dated Nov. 7, 1934, the court made a declaration in respect of the principal and interest under bond No. 3,300 that both were payable in gold, and entered judgment for the respondents for the sum due on that footing.

A judgment by default, if not set aside by the court on a proper application under the rules of court, is binding on the parties (which term may, in this, as in other, cases, include privies), and constitute *res judicata* in respect of the matter directly decided. Thus, it is not possible for the appellants to reopen the question in regard to bond No. 3,300, or to contest the declaration made in respect of that bond as to its construction and effect. The respondents, however, have contended that the default judgment has created an estoppel against the appellants on the true legal construction of the provision as to interest, which is all that is now in issue. It is not contested that there is no *res judicata* in regard to the 992 bonds sued on in the present proceedings in the same sense that there is *res judicata* in respect of bond No. 3,300. It is accordingly open to the appellants to defend the action in respect of these 992 bonds, but, in doing so, it is said, the appellants are bound by the construction of the interest provision which the court declared in the default action, because that specific issue of legal construction was decided as against the appellants. They had the opportunity of contesting it, and of raising the argument which they have raised before this House, and, as they omitted to do so, they are now precluded or estopped from raising it. In my judgment, there are several reasons why this contention should not be accepted. It may be that, where a matter of fact or law has been adjudicated upon by the court on the same instrument, and in regard to the same facts and between the same parties, an estoppel arises in regard to that matter, at least in a case where the party estopped has appeared in the proceedings and either contested the issue or contested the particular decision. This is not *res judicata* in the sense that the judgment binds the parties, but it is based on analogous principles. The decision of the court, it was said, should not be disputed by parties to it in a matter which was fundamental to the decision, though it was not the decision itself. That at least was the view taken by the Privy Council in *Hoystead v. Taxation Comr.* (4), where a matter fundamental

to the decision assumed and admitted in a previous litigation was held to bar parties from contesting the issue in a subsequent litigation. The parties were the same in both proceedings, and the subject-matter was the same, except in the sense that the question, which was that of liability to taxation, arose in respect of a later year in the second action. In *Broken Hill Proprietary Co. v. Broken Hill Municipal Council* (10), also A a case raising questions of taxation, it was held that the previous decision did not estop the taxpayer, and LORD CARSON, delivering the judgment of the Privy Council, said, at p. 100 :

The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. B The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principle of *res judicata* cannot apply.

It is not necessary here to decide between these judgments, if they conflict, or to reconcile them, if they merely seem to conflict. It is enough to say that they do not refer to default judgments, or to cases C arising in respect of different bonds or instruments, or to different states of fact, even if they appear to be identical in all practical respects.

No authority has been produced in which a party has been held to be estopped from raising in a litigation an issue which he might have raised in a previous litigation in which he allowed judgment to go by default D and omitted to raise the issue. The nearest analogy is *Howlett v. Tarte* (5). A defendant, sued for rent or a periodical payment under a building agreement, failed to plead issuably. His plea was struck out, and judgment went against him for default of pleading, under the procedure then current. He was sued for another instalment, and, by way E of defence, pleaded that the building agreement had been superseded by an agreement for a yearly tenancy, which had been determined, so that the rent claimed was not due. It was held that he was not estopped. That decision has been explained as depending on the old system of pleading, but I think that it depends on wider principles. I think that F it implies that default is not to be treated as an admission. WILLES, J., said that the plea in the second action, which was by way of confession and avoidance, was consistent with the record. He said that the objection was a new device, which he thought should not be introduced, and added, at p. 827 : G

But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action.

It is enough for present purposes to treat this observation as limited to a case where judgment has gone by default, whether of appearance or H pleading. In that sense, I should accept these observations of WILLES, J., one of the greatest common law judges. There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as

if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which, in the absence of express authority, I am not prepared to accept.

- A In the present case, however, it is not necessary to go so far, because there is an even stronger reason against admitting the estoppel. It is true that the default judgment expressly declares that the plaintiff was entitled to half-yearly interest on the basis of the gold clause. I may observe that, in my experience, it is unusual, and I think it is undesirable, in a default judgment to make a declaration on the construction of a document, but, apart from that, it is here a declaration limited to bond No. 3,300. There was no issue before the court as to any or all of the 992 bonds now sued on. The construction of each and any of these bonds was not a traversable issue in the previous action. The appellants could not be charged with the omission to traverse a claim which could not be traversed in that action because it was not before the court. Even on the narrowest view of the decision in *Howlett v. Tarte* (5), which would limit it to excluding the estoppel only when the particular issue could not have been traversed in the former action, the estoppel could not arise in this case. This ground is enough to distinguish the present case from any other case in which an estoppel has been found.

- I cannot help observing that this conclusion is in accordance, as I think, with practical convenience. If a party wishes to make an action a test action, he can do so if he secures the consent of the other party.
- E If that consent is obtained, an estoppel may well be established in all proper respects. However, if a writ is issued for a small claim, the defendant may well think it better to let judgment go by default rather than incur the trouble and expense of contesting it. When, as here, the default judgment on one bond is used as governing the construction of 992 bonds, even if identical in tenor, it would be a great hardship if the defendant were precluded from contesting the later action. I think that the plea of estoppel fails. In my opinion, on the question of interest, the appellants are right, and the order of the Court of Appeal should be varied accordingly.

- G LORD ROMER : My Lords, the questions arising on this appeal relate to certain bonds which were issued by the New Brunswick Railway Co., and contain what is now commonly known as a gold clause, the meaning and effect of which were determined by your Lordships' House in *Feist v. Société Internationale Belge d'Électricité* (1). It was there held that the obligation imposed upon the debtor by such a clause is not an obligation to pay in gold coin, or to deliver gold *in specie*, but an obligation to pay at the due date a sum equal to the then value of the gold coin specified. The decision in that case must now be regarded as laying down a general rule for the construction of all gold clauses in the absence of clear

language in the contract excluding that construction, and not as one depending upon the particular circumstances of that case. In *R. v. International Trustee for the Protection of Bondholders Akt. (2)*, my noble and learned friend LORD RUSSELL OF KILLOWEN expressed himself as follows, at p. 556 ([1937] 2 All E.R., at p. 179) :

These gold clauses have, however, come under the review of judicial tribunals in many countries and the "*Feist* construction" has prevailed, in that they are generally regarded merely as clauses to protect one of the contracting parties against a depreciation of the currency. It would, I think, be regrettable if uniformity in this respect did not prevail, and a different construction should be applied, except in cases where the "*Feist* construction" is expressly excluded. A

In the same case, when it was before the Court of Appeal, my noble and learned friend LORD WRIGHT, then Master of the Rolls, said, at p. 426 : B

The gold clauses in bonds and obligations are very common in international contracts and in every part of the world. It would be a very serious matter if contracts of that character were treated by particular courts as having a different meaning, in the absence of language and surrounding circumstances of a decisive character compelling that conclusion. The construction of such commercial clauses ought to be as far as possible uniform, unless there are the strongest considerations involving a different construction. C

I am unable to find any sufficiently substantial distinction between the language of the bonds now in question and the language of the bonds that were being considered in the *Feist* case (1) and the *Bondholders* case (2). I accordingly agree with the decision of the Court of Appeal, so far as relates to the principal moneys secured by the bonds. However, I differ respectfully from their decision as to the interest. The only obligation undertaken in respect of interest is expressed in the bonds as follows : D

With interest thereon at the rate of £5 sterling per centum per annum payable semi-annually on Feb. 1 and Aug. 1 in each year in the said city of London or, at the option of the holder at the offices of the company in New Brunswick on presentation and surrender of the interest warrants or coupons as they severally become due. E

I am unable to regard the word "thereon" in this provision as referring to the capital sum secured by the bond, for that sum, though an unvarying sum, fixed once and for all on Aug. 1, 1884, could not be ascertained under the *Feist* construction until Aug. 1, 1934, when it fell due for payment, inasmuch as the amount would depend upon the value of gold at that date. It would, therefore, be impossible to ascertain the amount due for interest in any half-year other than the one ending on that date. The word "thereon" must, accordingly, in my judgment, be regarded as referring to the sum of £100 sterling previously mentioned, a view that is corroborated by the coupons themselves, which provide for the payment of £2 10s. sterling each half-year, that sum being described as being 6 months' interest on the mortgage bond. This would appear to have been the construction adopted in the Court of Appeal by SCOTT, L.J. He thought, however, that the word "sterling," when used in relation to the interest on the bond, should be read as meaning "sterling as aforesaid"—that is to say, "sterling gold coin of Great F

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Britain of the present standard of weight and fineness." I can find no justification for this departure from what seems to me to be the unambiguous language of the bond. The reference to gold coin in the promise to pay the principal sum, and the omission of all such reference in the promise to pay interest, are significant. There is nothing to show
 A that the omission was not intentional, and it would be wrong for a court of construction to disregard it. In these circumstances, the appellants cannot in this action be called upon to pay, in respect of interest, more than £2 10s. on each bond, unless this question of interest be *res judicata* by reason of the judgment by default in the earlier action brought by
 B the respondents against the appellants.

My Lords, as to this, I am unable to agree with the Court of Appeal. Whether a judgment by default can ever be relied upon as *res judicata*, and, if it can, whether the judgment alone is to be regarded, or whether the whole record of the proceedings may be looked at, are questions
 C upon which I do not find it necessary to express any opinion, for, assuming both those questions to be answered in favour of the respondents to this appeal, I am unable to discover anything in the judgment or in the record of the proceedings in the former action that can estop the appellants from now litigating the question of the amount of interest
 D payable under the 992 bonds sued upon in the present action. In the earlier action, the only question of construction mentioned in the writ or in the statement of claim was one as to the construction of the bond then being sued upon, and the judgment pronounced in default of appearance cannot, in my opinion, be regarded as having determined the
 E question of the construction of the other bonds possessed by the respondents, for that question was never a traversable issue in the action, and would not have been a traversable issue even if the action had been fought out upon a defence that merely put in issue the allegations contained in the statement of claim. Had the question of construction
 F been then determined by the court after argument, the decision would no doubt have been followed in any action brought subsequently upon any other bonds in the same form, and would necessarily have been followed had the decision been that of this House. However, this would have happened whoever might have been the plaintiff in the action
 G subsequently brought. It would have resulted, however, from the respect paid to authority, and not from an application of the doctrine of *res judicata*. In other words, it would have resulted from the fact that, in the former action, a precisely similar question had been decided, and not because the same question had been decided. In this connection,
 H some reliance was placed by the respondents upon a passage contained in the judgment of the Privy Council delivered by LORD SHAW in *Hoystead v. Taxation Comr.* (4), at p. 170 :

It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point whether of assumption or admission, which was in substance the ratio of and fundamental to the decision.

It was sought to treat this passage as an authority for the proposition that the plea of *res judicata* can successfully be raised whenever it can be shown that a question substantially similar to that being litigated has been decided in an earlier action between the same parties. My Lords, I cannot read the words that I have just cited as laying down any such proposition, a proposition for which, I venture to think, no authority can be found in the books. It is no doubt true to say that, whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter. However, this is very different from saying that he may not thereafter litigate, not the same question, but a question that is merely substantially similar to the one that has already been decided. If, in an action, the question of the construction of a particular document has been in substance decided, each party to the action is estopped from subsequently litigating the same question of construction of that particular document. However, he is not estopped from subsequently litigating the question of construction of another document, even though the second one be in substantially identical words, for the documents are two distinct documents, and the questions of their construction are two distinct questions.

My Lords, for these reasons, I am of opinion that HILBERY, J., ought to have given judgment in favour of the respondents for the sum of £162 10s. 9d. for principal, and £2 10s., less income tax, for interest due on Aug. 1, 1934, in respect of each of the 992 bonds. In point of fact, he ordered judgment to be entered for the appellants, for he declined to give to the bonds the *Feist* construction, holding that there were considerable differences between the language of the bonds in that case and the language of the bonds in the case before him. So indeed there are, but, at the date that the judge was dealing with the matter, the *Bondholders* case (2) had not been decided by the Court of Appeal, and it is that decision, affirmed as it was by your Lordships' House, that has robbed those differences of all materiality. The respondents then took the matter to the Court of Appeal, but, by the time the appeal came on for hearing, a Canadian Act, known as the Gold Clauses Act, 1937 (1 Geo. 6, c. 33), had come into force. This fact is clearly of no materiality if the "proper law of the contract" contained in the bonds be the law of England. However, even if the proper law of the contract be Canadian, the Act cannot, in my opinion, avail the appellants, for the bonds provide for the payment of the principal moneys in London, so that, although the measure of the company's obligations should have to be determined according to the law of Canada, its obligations in respect to the principal moneys would have to be discharged in conformity with the law of England. For, in the case of a contract which is governed by English law, but which provides for its performance in a foreign country, a term is to be implied in the contract that such perform-

ance shall be regulated by the law of that country—that is, the *lex loci solutionis*—and, there being no evidence that Canadian law differs from our law in this respect, it is to be assumed that this rule prevails in Canada. If, therefore, Canadian law were the proper law of the contract, it would become necessary to ascertain whether the Canadian Act is one that affects the measure of the company's obligations, or merely purports to affect the method in which those obligations are to be discharged.

By sect. 2 of the Act, the expression "gold clause obligation" is defined as meaning any obligation theretofore or thereafter incurred (including any such obligation which had, at the date of the commencement of the Act, matured) which purports to give to the creditor a right to require payment in gold or in gold coin or in an amount of money measured thereby. In view of the fact that the *Feist* construction regulates the bonds in the present case, they must not be regarded as purporting to give the holders a right to require payment in gold or in gold coin. They do, however, purport to give him a right to require payment in an amount of money "measured thereby," and therefore contain a "gold clause obligation" within the meaning of the Act, although they had matured at the date of the commencement of the Act. Sect. 3 is concerned only with gold clause obligations payable in money of Canada, and can, therefore, be passed over. Then comes sect. 4, which deals with gold clause obligations governed by the law of Canada payable in Canada or elsewhere in money other than money of Canada. So that, in the case supposed, the clause would seem to be applicable to the bonds in question. The section provides that, in the cases to which it applies :

... tender of the nominal or face amount of the obligation in currency which is legal tender for the payment of debts in the country in the money of which the obligation is payable shall be a legal tender, and the debtor shall, on making payment in accordance with such a tender, be entitled to a discharge of the obligation.

My Lords, there was considerable discussion during the argument before your Lordships as to the precise meaning to be attributed to the words "tender" and "legal tender" in this section. Whatever may be the precise meaning of those words, however, the section is, in my opinion, dealing with the discharge of the obligation, and in no way with its measure. It does not, for instance, purport to abrogate or interfere with the application of the rule in *Feist's* case (1). On the contrary, it is in terms dealing with cases where the *Feist* construction applies and cases where it does not, for it deals both with cases where the obligation is to pay (say) £100 by the delivery of gold or gold coin and cases where the obligation is, by reason of the reference to gold or gold coin, construed as one to pay, not £100, but (say) £160. In the latter case, the clause, as I read it, enacts that, if a "legal tender" of £100 is made in 100 Treasury notes of £1 each, and such notes are subsequently paid by the debtor, the debtor is discharged from "the obligation"—that is, the obligation to pay £160. The measure of the obligation remains what

it was before the Act, but it can be discharged by a "legal tender" and a subsequent payment of £100. This being so, and the method of discharge of the appellants' obligations under the bonds being in any case regulated by the law of England, and not by the law of Canada, sect. 4 of the Act can have no bearing upon the present case.

It remains, however, to consider sect. 6 of the Act, which is in these terms :

Every gold clause obligation is hereby declared to be contrary to public policy and no such provision shall hereafter be contained in or made in respect of any obligation.

This section is plainly dealing with the measure of the obligation, and not with its discharge, and, in any contract governed by Canadian law, must have effect given to it. However, it could not affect the present case unless the first sentence of it can be read as an enactment independent of, and unqualified by, the second sentence—that is to say, as one not confined to contracts entered into after the Act came into operation. If it can be so read, it would seem to be in effect an enactment that, in every contract governed by Canadian law remaining undischarged at the date of the commencement of the Act, a provision requiring the discharge of a monetary obligation in gold or gold coin is to be treated as void, and that an obligation such as is contained in the bonds in the present case shall not receive the *Feist* construction, for it cannot have been intended to invalidate the obligation to pay what the Act calls the nominal or face amount of the obligation. My Lords, I cannot think that sect. 6 of the Act was intended to have so wide an operation. If such had been the intention of the Canadian legislature, sect. 4 of the Act would have been quite unnecessary. There would have been no point in providing for the method of discharging the "gold clause obligations" if such obligations were themselves invalid to the extent that I have mentioned. In my opinion, the better construction of sect. 6 is to regard it as being confined to obligations entered into after the Act came into force, and, so construed, it could have no bearing upon the questions to be determined on this appeal, even though the proper law of the contract were Canadian. In these circumstances, I do not find it necessary to consider the question as to what is in truth the proper law of the contract, or the question whether, in view of the fact that the Act did not come into operation until after the hearing before HILBERY, J., the appellants could have relied upon its provisions. I agree that the order of the Court of Appeal should be varied in respect of the interest due on Aug. 1, 1934, and that, subject to this, the appeal should be dismissed with costs.

Appeal allowed as to interest payments only, with costs against the appellants.

Solicitors : *Linklaters & Paines* (for the appellants) ; *Allen & Overy* (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

FOX v. MARSHALL.

[COURT OF APPEAL (Slessor, Clauson and Goddard, L.JJ.), **December 9, 12, 1938.**]

Landlord and Tenant—Rent restriction—Controlled dwelling-house—Recovery of possession by landlord in 1928—Subsequent division into two dwelling-houses without structural alteration before 1933—Each half a class C house—No registration—Whether each half reconrolled—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 2.

In 1928, a landlord obtained possession of a dwelling-house, which thereupon became decontrolled. He then subdivided it into two, without any structural alterations. The rateable value of the whole house was at all material times over £20 and that of each half under that value, the house being within the metropolitan police area. Upon the coming into force of the 1933 Act, no application was made to register either half of the house as decontrolled. The tenant of one half applied for the rent to be apportioned, and contended that the 1933 Act had the effect of bringing both halves within the operation of the principal Act:—

HELD: as the rateable value of the whole house was over £20 at all material times, it was not permissible to apply the 1933 Act to a part thereof, and thereby to exclude that part from the decontrol in 1928.

The application for apportionment of rent ought, therefore, to be refused.

[EDITORIAL NOTE.] It will be noted that in the present case there was decontrol of the whole house before subdivision, and that the subdivision was before 1933.

In such circumstances, the effect of the 1933 Act is not to bring the part into control, though it may be that, if the subdivision had been made while the house was controlled, and then a part had been decontrolled, that part would have been brought back into control by the 1933 Act.

AS TO EFFECT OF 1933 ACT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 317-319, paras. 375-378; and FOR CASES, see DIGEST, Supp., Landlord and Tenant, Nos. 7359f-7361b.]

Case referred to:

(1) *Brooks v. Brimcome*, [1937] 2 K.B. 675; [1937] 2 All E.R. 637; Digest Supp.; 157 L.T. 417.

APPEAL from a decision of His Honour JUDGE HURST, at Croydon County Court, dated May 24, 1938, reversing an order of the registrar, dated Mar. 3, 1938, which order apportioned the rent of the premises occupied by the appellant. The facts found by the registrar were as follow. The tenant holds a dwelling—namely, the upper half of 11, Arnold Road—on a weekly contractual tenancy from the owner, paying 15s. per week. The dwelling consists of 3 rooms and a lavatory, and is equal in value to the lower half, which consists of 3 rooms, a lavatory and a scullery. The apportioned rateable value of the dwelling (which is in the metropolitan police district) on the appointed date (Apr. 1, 1931) was £11 10s. per annum. The standard rent of the whole of 11, Arnold Road, was 12s. 6d. per week, inclusive of rates. The apportioned standard rent of the upper half was 6s. 3d. per week, inclusive of rates. Neither the house nor the upper half has been registered under sect. 2 (2) of the 1933 Act.

S. Parnell Kerr for the appellant.

W. Granville Wingate for the respondent.

Kerr : The landlord decontrolled the whole house, and, therefore, both halves, and so the Act ceased to apply to the halves, and, as both halves are class C houses, he should have registered them as decontrolled. Both halves existed in 1923, although neither was at that time a dwelling-house, as the house had not then been divided. [Counsel referred to *Brookes v. Brimcome* (1).]

Wingate was not called on.

SLESSER, L.J. : The question which has to be considered in this case is a very simple one, and I hope that it can be dealt with very shortly. There was a dwelling-house which, at the time of the passing of the Rent and Mortgage Interest Restrictions Act, 1923, was a dwelling-house within the meaning of the principal Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. By sect. 2 (1) of the Act of 1923 :

(1) Where the landlord of a dwelling-house . . . is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after . . . the date when the landlord subsequently comes into possession [which is this case] the principal Act shall cease to apply to the dwelling-house. . .

In 1928, this landlord came into possession of the dwelling-house, and thereafter, by operation of sect. 2 (1) of the Act of 1923, the principal Act ceased to apply to the dwelling-house, and the dwelling-house, therefore, was one, to use the language of the judge in this case, for which the landlord was free to charge a contractual rent. In 1933, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was passed, and came into operation on July 18, 1933. Sect. 2 (1) of that Act provides as follows :

Subject as hereinafter provided, sect. 2 of the Act of 1923 (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) [which is this case] shall not apply to any dwelling-house of which the rateable value on the appointed day did not exceed (a) in the metropolitan police district or the City of London, £20.

There is no question but that the rateable value of this house as a whole at all material times was over £20. Therefore, sect. 2 of the Act of 1933 did not operate to bring back under the Rent Restrictions Act this house which had ceased to be under the Act by reason of the landlord having come into possession in 1928. Therefore, any application by a tenant of part of the house for an apportionment of rent, or any other matter, which depended on the house being under the Rent Restrictions Acts, would necessarily fail. Mr. Kerr says, however, that that is not a right conclusion. He says that this house, after 1928, albeit the house as such remained as decontrolled, was let in parts, and one of the parts, which the present plaintiff occupied at all material times, was a part of a house which had a rateable value, as ascertained by the registrar on apportionment, of not more than £20. Therefore, he says, although the house, as a whole, is not brought back into control by sect. 2 of the Act of 1933, this part is, and he says that therefore he is entitled to an apportionment, because the landlord has not, under sect. 2 (2) of the same Act, registered that

part of the house. In my opinion, that argument is entirely fallacious. The subject-matter of sect. 2 (1) of the Act of 1933 is the same as the subject-matter of sect. 2 (1) of the Act of 1923. That is to say, the dwelling-house which was decontrolled in 1928 is only brought back in
 A 1933 if it is a house of a rateable value not exceeding £20. As the whole house had a greater rateable value, it is not permissible to take a part of the house and apply the Act of 1933, and exclude from the removal of control in 1928 that particular part of the house. That would be to read into the section something which is not there. It is true that,
 B under the provisions of sect. 12 of the principal Act, the Act applies to part of a house, and, if part of the house had originally become decontrolled in 1923, it might be that it was brought back into control under the Act of 1933. Those are not the facts of this case. The dwelling-house ceased to be under the Acts in 1928, and there is no provision to bring the house back into the ambit of the Rent Restrictions Acts, because the rateable value is too high to be struck at by sect.
 C 2 (1) of the Act of 1933. This appeal, therefore, fails.

CLAUSON, L.J. : I agree.

D GODDARD, L.J. : I agree.

Appeal dismissed, with costs.

Solicitors : *Webster Butcher & Sons* (for the appellant) ; *Harry Chandler* (for the respondent).

E [Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

J. F. ADAIR & CO., LTD. v. BIRNBAUM.

-F [COURT OF APPEAL (Slessor, MacKinnon and Finlay, L.JJ.), **November 22, 1938, December 5, 1938.**]

Sale of Goods—Failure to deliver—Insolvency of seller—Clause providing for insolvency—Notice condition precedent—Clause providing for default—Voluntary default—General Produce Brokers' Association contract.

G The buyer purchased from the sellers a large quantity of pepper, the contract being in the form used by the General Produce Brokers' Association. It provided that, upon the seller failing to fulfil the contract, the buyer should close by invoicing back the contract to the seller at once, at a price and weight fixed by arbitration, not being less than
 H 2 per cent. nor more than 10 per cent. over the market value on the day of default. The difference between the contract price and the invoicing back price, which was to be paid in cash within 7 days, was to be a final settlement between the parties. Another clause provided for insolvency before the maturity of the contract, but this clause was subject to the insolvent receiving 48 hours' notice that the other party elected to act upon it. The sellers, before the time of shipment arrived, suspended payment. Some time after the insolvency, the general committee of the General Produce Brokers' Association purported to close the contract, but the buyer did not accept the position, and refused to pay any sum

to the claimants, and the matter was thereupon referred to arbitration under the arbitration clause in the contract :—

HELD : (i) the clause first referred to operated in favour of the sellers equally with the buyer, even though the former were in default under the contract.

(ii) the two clauses were not inconsistent, and, as in this case the sellers failed to fulfil their contract by tendering shipping documents at the contract dates, the present was not a case within the rule expressly limited to insolvency before the maturity of the contract. The sellers were, therefore, entitled to rely on the first clause mentioned above.

Decision of GODDARD, J., ([1938] 1 All E.R. 532) affirmed.

[EDITORIAL NOTE.] The Court of Appeal have here felt themselves bound to decide this case in accordance with the decision in *Lang's* case (5) and that in *Lancaster's* case (1) ; but the Lords Justices have intimated that they have a grave doubt whether the previous authorities, though binding on them, are correctly decided. SCRUTTON, L.J., delivered a strong dissenting judgment in *Lancaster's* case (1), and, in a commercial matter, his views are of very great weight. It is hoped, therefore, that the present case may go to the House of Lords, so that the highest court may express its views upon a form of contract that has been widely used for a long period, and under which, as the law now stands, a buyer has been ordered to pay over £5,000 to a seller admittedly in default.

AS TO THE EXCLUSION OF MARKET PRICE RULE, see HALSBURY, Vol. 29, p. 199, para. 266 ; and FOR CASES, see DIGEST, Vol. 39, pp. 671, 672, Nos. 2582-2587.]

Cases referred to :

- (1) *Lancaster v. Turner (J. F.) & Co., Ltd.*, [1924] 2 K.B. 222 ; 39 Digest 672, 2585 ; 93 L.J.K.B. 1024 ; 131 L.T. 525.
- (2) *Re Bourgeois (Fl.) & Wilson, Holgate & Co.* (1920), 25 Com. Cas. 260 ; 39 Digest 661, 2520.
- (3) *Roth, Schmidt & Co. v. Nagase (D.) & Co., Ltd.* (1920), 2 Lloyd, L.R. 36 ; 39 Digest 587, 1886.
- (4) *Julius v. Oxford (Bp.)* (1880), 5 App. Cas. 214 ; 42 Digest 716, 1351 ; 49 L.J.Q.B. 577 ; 42 L.T. 546 ; *affg.* S.C. *sub nom. R. v. Oxford (Bp.)* (1879), 4 Q.B.D. 525.
- (5) *Lang v. Crude Rubber Washing Co.* (1911), Unreported.
- (6) *Brogden v. Marriott* (1836), 3 Bing. N.C. 88 ; 39 Digest 409, 434 ; 5 L.J.C.P. 302.
- (7) *Luckett v. Wood* (1908), 24 T.L.R. 617 ; 12 Digest 303, 2498.
- (8) *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*, [1919] A.C. 1 ; 39 Digest 667, 2560 ; 87 L.J.K.B. 746 ; 118 L.T. 731 ; *affg.*, [1917] 2 K.B. 717.

APPEAL by D. Birnbaum, the buyer, from a decision of GODDARD, J., dated Jan. 27, 1938, and reported [1938] 1 All E.R. 532. The facts are fully set out in the judgment of SLESSER, L.J.

A. T. Miller, K.C., and *W. Lennox McNair* for the appellant.

Sir Robert Aske, K.C., and *H. G. Robertson* for the respondents.

Miller, K.C. : The judge was wrong. The position is that, on the default by the seller, no claim on this contract is effective. If parties choose to make a contract the results of which are contrary to English common law, they may do so, and the court will enforce it if it can understand it. If, however, a party intends to make himself liable to pay a defaulter, contrary to all usual rules, he must say so quite clearly. *Lancaster v. Turner (J. F.) & Co., Ltd.* (1) does not bind this court in any way in this case. Every contract must be construed with reference

to the particular words used therein. The words here are quite different. Alternatively, this court can overrule itself. In *Lancaster's* case (1), there were two judges supporting each view. [Counsel also referred to *Lang v. Crude Rubber Washing Co.* (5), *Roth, Schmidt & Co. v. Nagase (D.) & Co., Ltd.* (3), *Re Bourgeois (Fl.) & Wilson, Holgate & Co.* (2) and *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* (8).]

A *McNair*, following on the same side: *Lang's* case (5) was merely a decision upon the words of that particular clause. There is nothing to show that the other clauses were the same as they are here. The form of words used in these clauses changes from time to time. In no case has cl. 9 (f) ever been applied in a case of insolvency. Alternatively, the award was bad because the arbitrator went outside the terms of reference. He had no power to order payment of a sum of money.

B *Aske, K.C.*: A clause substantially in this form has been used for years. Generally the buyer is in a better position than that in which he would be at common law. It is not necessary to read into the contract words which are not there. The court will not do that unless it is essential. There is a general arbitration clause in this contract, providing that all disputes are to be referred to an arbitrator.

C *Robertson*, following on the same side: It is not right to talk about taking away a party's common law rights. His common law rights are those that the contract gives him. It is irrelevant whether the default was voluntary or not.

McNair, in reply.

E SLESSER, L.J.: The appeal in this case involves the consideration of the rules and conditions of sale published by the General Produce Brokers' Association of London, and is, therefore, of importance beyond the interest of the parties directly concerned. The case comes to this court on appeal from GODDARD, J., on a judgment given by him on a special case stated by an arbitrator.

F By a series of contracts made between the sellers, J. F. Adair & Co., Ltd., and Mr. Birnbaum, the buyer, among other transactions, 260 tons of black pepper were sold by the sellers to the buyer for future delivery during January, February, or March, 1935, in some cases, and during March, April, or May, 1935, in others. On Feb. 9, 1935, the sellers suspended payment, and on Feb. 25, 1935, a winding-up order was made and a liquidator of the company was appointed. Thereafter, after default by the sellers in the case of all the contracts, on June 20, 1935, the liquidator of the plaintiff company sent to the buyer a statement of account showing a balance due to the company, being a claim based upon the terms of the contract between the parties which I shall consider hereafter. Mr. Birnbaum, through his solicitor; on July 1, 1935, denied that any sum was due from him, and asserted that there was a substantial balance owing to him. After considerable correspondence, the

liquidator referred the matter to arbitration, relying, in the first place, upon cl. 11 of the rules and conditions of sale of the General Produce Brokers' Association, but subsequently basing his case upon cl. 9 (f) of the same regulations, on which basis the arbitrator eventually proceeded.

Clause 9 (f), which is thus the cardinal one to be considered, provides that, in the case of contracts for future delivery during specified periods, A tenders or declarations must be made on or before the last day available to the contract, and that the following rules shall apply besides the other rules of the association :

Whenever it may be admitted by the seller, or decided by arbitration, that the seller has failed to fulfil the terms of the contract the buyer shall "close" by invoicing back the contract to the seller at once, at a price and weight to be fixed by arbitration which price shall not be less than 2 per cent., and not more than 10 per cent., over the estimated market value of the shipment contracted for on the day on which the default occurs, the difference between contract price and invoicing back price to be paid in cash within 7 days; and this payment shall constitute a final and complete settlement of all claims by either party in respect of the said contract. B

The arbitrator found as a fact that the sellers had failed to fulfil the terms of the contracts, and that, upon the true construction of the contracts, the 260 tons of pepper sold to the buyer should be invoiced back to the sellers at the price of 4*d.* per pound, and awarded and declared that the sellers were entitled so to have the goods invoiced back to them D at that price, and that the buyers were to pay the sellers the sum of £5,520 9*s.* 1*d.* He subsequently stated that this sum included the percentages referred to in cl. 9 (f). On behalf of the buyers, it was argued before us that cl. 9 (f), properly considered, gave no rights to the sellers at all. It was a clause, it was contended, which could only come into E operation at the option of the buyer, when the seller had failed to fulfil the terms of the contract, and, though the words following were that the buyer should close the contract by invoicing back, the meaning was that it should be permissible for him so to do, and it was contended that F the rule only operated to give a remedy to the buyer against the defaulting seller in contradistinction to cl. 8, which deals with the case of the buyer failing to fulfil his terms of the contract. To decide otherwise, it was said, in the circumstances of a falling market, would be to profit the seller as the result of his own wrongful act.

Alternatively, for the buyer, it was argued that, this being a case of G insolvency, it could be covered only by cl. 11, which is in the following terms :

If before the maturity of any contract either party liable on the face thereof shall suspend payment, or be a defaulter, or issue a notice convening a meeting of his creditors, or become bankrupt or insolvent, such contract shall thereupon be closed (48 hours' notice having been previously given to him) upon terms to be fixed by arbitration in accordance with r. 7 of the General Produce Brokers' Association of London. H

As here, admittedly, such 48 hours' notice had not been given to the sellers by the buyer, the contract was not closed at the time of the insolvency, but continued on until its date of performance, when the sellers

made default, and so, while the buyer might well preserve his common law rights, it was contended that the sellers, being excluded both from cl. 9 (f) and cl. 11, on any view would have no claim.

Were the matter free from authority, I should myself be prepared to say that there was very great weight in the contention of the appellant
A that cl. 9 (f) was a permissive power in the hands of a buyer against a defaulting seller. Any other result SCRUTTON, L.J., has described in *Lancaster v. Turner (J. F.) & Co., Ltd.* (1) as "extraordinary." In that case, he was dealing with a rule in the London Corn Trade Association's conditions substantially similar to the present, and he points out that,
B in two cases where the clause was in effect in the present form—that is to say, in *Re Bourgeois (Fl.) & Wilson, Holgate & Co.* (2) (where it was held that a similar clause did not apply where the buyer was claiming special damage against the defaulting seller) and in *Roth, Schmidt & Co. v. Nagase (D.) & Co., Ltd.* (3) (where it was held that a similar clause did
C not apply where the buyer was claiming back from a defaulting seller the price paid in advance—he had expressed similar views in his judgments. His view was that the words "settlement shall be made"—the phrase here is "this payment shall constitute a final and complete settlement"—pointed to a settlement of the default, and did not clearly, or
D at all, indicate a payment by the buyer who is not in default. In other words, he would construe the words "the buyer shall close by invoicing back the contract" as the buyer "may," a construction which is sometimes permissible in the context: see *Julius v. Oxford (Bp.)* (4), where it is pointed out that the words "it shall be lawful" confer a power, but
E do not necessarily impose a duty.

However this may be, the views of SCRUTTON, L.J., in *Lancaster's* case (1) were dissenting opinions. The majority of the court, without question, decided that the proper construction of cl. 9 (f) is that given by GODDARD, J., in the present case. That is to say, the buyer is bound,
F if the circumstances contemplated in cl. 9 (f) arise, notwithstanding that the sellers are in default, to invoice back the contract to the sellers at a price and weight to be fixed by arbitration as there provided. Thus BANKES, L.J., says, at pp. 230, 231 :

... it is no concern of the court to consider whether the rule is reasonable or not.
G I merely say what I do in order to indicate that I continue to entertain the opinion which I expressed in *Lang v. Crude Rubber Washing Co.* (5). . . .

In that case, HAMILTON, J., as he then was, had expressed the opinion, with which the rest of the court agreed, "that the words of the rule were mandatory." BANKES, L.J., in *Lancaster's* case (1), continued, at p. 231 :

H The event on which it [the rule] is to come into operation is a default on the part of the sellers in shipping or declaring shipment. In that event a notional sale is to take place carried out by buyers invoicing back the goods contracted for at a price to be fixed as provided in the rule.

Similarly SARGANT, L.J., says that *Lancaster's* case (1) is a clear authority in favour of the sellers, and adds, at p. 238 :

There, as here, the claim was one by defaulting sellers against a buyer, where the

market had fallen, and where the rules were very similar to those here, but apparently somewhat less stringent or imperative.

He was of opinion that the rules were enforceable in favour of a seller, though in default. All three judges treat the rule in *Lang's* case (5) as so similar to that in *Lancaster's* case (1) as to fall to be determined upon the same principles, and, despite the contention of Mr. Miller, I can find A no essential difference between the present rules and those of the same Association in *Lang's* case (5)—the new provision having reference only to the method of fixing the price—or of all the rules of the London Corn Trade Association. It has, therefore, to my mind, been decided, by binding authority, that, if cl. 9 (f) is to be applied to the present case, the B appellants must fail.

I pass, therefore, to the second contention for the appellants, which is to the effect that cl. 9 (f) has no application to a case like the present, where, admittedly before default, there was insolvency, which is covered only by cl. 11. It is argued that, insolvency and the like being expressly C mentioned in cl. 11, it must be assumed that such a contingency, where it results in a failure to fulfil the terms of the contract, is dealt with solely under that rule—the conditions of which, as I have said, have admittedly not been satisfied here—and it is sought to apply the doctrine *expressio unius est exclusio alterius* to the exclusion of cl. 9 (f), an indication relied D upon to this effect being the requirement in cl. 9 (f) to pay in cash within 7 days, which cash could not be expected to be forthcoming in the case of the insolvencies mentioned. In my view, this argument is untenable, on the facts as found in para. 18 of the award. The arbitrator has found that the sellers failed to fulfil the terms of the contracts, and such a E failure is not said to have occurred at the time of the insolvency, but must be taken to be a failure to tender or declare the shipping documents at the contract dates. The application of cl. 11 is expressly limited to cases before the maturity of any contract, and contemplates the events there stated taking place before the time of performance. The two rules F are in no sense inconsistent, and, whereas the obligation under cl. 9 (f) is on the buyer to invoice back to the seller, cl. 11, where notice has been given to the insolvent party (being either buyer or seller, as the case may be), provides that the contract shall be closed upon terms to be fixed by arbitration. There is no reason to suppose that, at any rate G in certain of the cases mentioned in cl. 11, such as a party issuing a notice convening a meeting of his creditors, an obligation might not be discharged as there provided by payment in cash. In the result, therefore, I have come to the conclusion, though with some regret, that this case is decided, so far as the Court of Appeal is concerned, by the decision in H *Lancaster's* case (1). Therefore, this appeal must be dismissed.

MACKINNON, L.J. : I agree that, by reason of certain precedents, and in particular by reason of the decision, by a majority, of this court in *Lancaster v. Turner (J. F.) & Co., Ltd.* (1), we are constrained to dismiss

this appeal. If I were not hampered in that way, I should have decided otherwise. As I hope that this case may go to the House of Lords, and that this type of contract may there be considered for the first time, I desire to make some observations upon it.

A I observe that in *Lang v. Crude Rubber Washing Co.* (5), the earliest case to which we were referred, HAMILTON, J., as he then was, said :

I do not think it is necessary to deal with the possibility of a case in which the seller without any excuse whatever, simply saying he did not choose to perform his contract, has made a declaration of default called an admission.

B In *Lancaster's case* (1), BANKES, L.J., said, at p. 231 :

Some day it may have to be decided what the position is if the default on the seller's part was a voluntary default . . .

C I confess I do not understand what is meant by a default for which there is an excuse, or what is meant by a voluntary default. If a seller fails to deliver the goods he has agreed to sell, it is a breach of contract. If there is some exception clause in his contract, which protects him, there is no breach of that contract. Otherwise, his failure to deliver is simply a breach of contract, no more and no less. Any consideration as to the morality or decency of his action in failing to fulfil his contract is perfectly D irrelevant.

There is, however, another aspect of this from a commercial, as well as from a legal, point of view. I entreated Sir Robert Aske, who appeared for the sellers in this case, to try to explain to me what was the business man's reason for an apparent devotion to the idea that one man ought to E make a profit out of breaking his contract at the expense of the man who is willing to perform it, or has not been shown to be unwilling. It was no doubt my fault that Sir Robert did not succeed very well in that explanation, but I gathered that the idea was this : " The buyer has agreed to pay the seller 6*d.* When the price has fallen to 4*d.*, the buyer, on hearing F that the seller cannot, or will not, deliver, can go into the market and buy at 4*d.* He will then have the goods he wanted at 4*d.* However, as he agreed to pay the seller 6*d.* for them, he will be just as well off if he pays 2*d.* to the seller as he would have been if the seller had delivered and he had had to pay him 6*d.*" This seems also to have been the G understanding of BANKES, L.J., who, in *Lang v. Crude Rubber Washing Co.* (5), said that the object of the rule was that :

The buyer, subject to certain allowances, shall be entitled to retain only a sufficient portion of the purchase money to enable him to obtain elsewhere the subject-matter of the contract, and must pay over any balance of the purchase price to the vendor.

H This theory assumes that there is an available market in which the buyer can get the goods that the seller has failed to supply. If that be so, however, the seller could get them in that market just as easily as the buyer could, and that must mean that the seller does not choose to get them. If so, the default of the seller is " without any excuse whatever," in the phrase of HAMILTON, J., and is " a voluntary default " in the

language of BANKES, L.J. Moreover, if the seller can buy in the market as easily as the buyer can, it is obvious that he will do so, for he will then get his full 2*d.* difference in price, instead of having to suffer the abatement of from 2 to 10 per cent. in favour of the buyer under the clause. In short, it is only when neither the seller nor the buyer can get the goods that the seller will want to claim the benefit of the clause. This means that, when neither of them can get the goods, because no goods are available, the buyer will suffer hardship and loss, while the seller's default is involuntary, and is excusable, if default can be called "excusable" otherwise than by reason of some exception in his contract. Yet when either of them can get the goods from the ample supplies of "the market," the buyer will suffer no loss (apart from the effect of this clause), while the seller's default is voluntary, and, in every sense, inexcusable. Yet the reasoning of the passages I have referred to seems to be that, where the buyer has suffered loss by the seller's default, this contract must avail to make him suffer further loss by paying the seller a reward for his default. However, if the buyer has suffered no loss, it may be a question whether the clause ought to have that result, seeing that the seller's default was voluntary. I do not understand this reasoning.

There is another aspect of this theory of an available market to which the buyer can resort at the lower price, if the seller chooses not to do so. The business involved in this contract, and very likely in the majority of the contracts under the rules of the Produce Brokers' Association, is not the sale of goods that are stored in warehouses ready for delivery to any caller. These are c.i.f. contracts, some for shipment January to March, and other for shipment March to May. You deliver the goods by handing over the appropriate documents, and you can deliver in that way only. If, on one of the contracts for 40 tons March/May shipment, you hand over a bill of lading and an insurance policy covering 40 tons, but the bill of lading is dated June 1, you have broken your contract, and it is a bad delivery, though the 40 tons of pepper may be as good as any pepper that ever was grown, and the time for performance of such a contract, March/May shipment, by handing over the documents, may be postponed to a date after May that will give the steamer loaded in May time to arrive. If the seller has not shipped any goods, and has not bought a bill of lading representing goods shipped by another, and defaults, it may well be that the buyer cannot buy such a bill of lading any more than the seller. Moreover, if the seller has an "excuse" for not procuring such a bill of lading, or if his failure to do so is not "voluntary," it is the more likely that the buyer will be equally unable to buy such a bill of lading in what is airily assumed to be "the market" in Sir Robert Aske's exposition of the theory.

When it is further remembered that the buyer, having agreed to buy at 6*d.*, has very likely resold to someone else at 6½*d.*, the position of the buyer may be thought to be still more burdensome. However, I

suppose the theory is that he will have made his contract of resale upon the same terms, so that, while he pays to his seller at 6*d.*, he will receive from his buyer at 6½*d.* This means that the real sufferer in this game, at which sellers play "Heads I win, tails you lose," will be the ultimate buyer who has not resold. He would be the only trader who really
A desired to have the goods delivered to him. It may be, indeed, that he and the shipper would be the only genuine traders, linked one to the other by a succession of intervening gamblers.

Consideration of the case of the ultimate buyer, who has not resold on this sort of contract, and who is as unable as the sellers to buy in "the
B market" that which they have failed to deliver, suggests a reference to another of the cases that were cited to us, *Re Bourgeois (Fl.) & Wilson, Holgate & Co.* (2). A clause of this type was in the contract of sale. However, the buyers had resold, and they had intimated the fact of that resale to the sellers. On the default of the sellers, they would, therefore,
C at common law, be entitled to special damages—namely, the loss of profit on the resale. It was held that, "in the circumstances," the sellers were liable for those damages, and were not entitled under the clause to claim from the buyer the difference between the contract price and the lower market price at the date of their default. I confess I do not
D understand the logic of that decision, standing alongside the decisions in *Lang v. Crude Rubber Washing Co.* (5) and *Lancaster's* case (1). The effect of the clause in the *Bourgeois* case (2) would result in an outrageous variation of the common law rules as to damages for breach of contract, so it was held that, "in the circumstances," the clause could
E not be allowed to have any effect. In the present case, or in *Lancaster v. Turner (J. F.) & Co., Ltd.* (1), the effect of the clause is to result in a variation of the common law rules as to damages for breach of contract not perhaps so outrageous to the mind of the common law lawyer as in
F *Re Bourgeois (Fl.) & Wilson, Holgate & Co.* (2), but still an undoubted variation. Except as to the degree to which the rule of law is flouted in the one case and in the other, what is the difference in principle between them? Again, if the buyer in one of these cases proved (a) that he was the ultimate buyer, and (b) that he was unable, like the line of previous
G sellers, to buy the goods in the market on their default, would these facts constitute "special circumstances" within the decision of *Re Bourgeois (Fl.) v. Wilson, Holgate & Co.* (2), so that the clause must not be allowed to compel the wretched buyer to reward his seller for breaking his contract? In short, if a contract worded in a particular way is, as a
H matter of construction, held to have a certain effect, I do not understand why it is to cease to have that effect either because of "certain circumstances" which involve hardship, or aggravated hardship, on one of the contracting parties or because the breach of his contract by one of them is "voluntary" or "inexcusable."

For my own part, I prefer the dissentient judgment of SCRUTTON, L.J., in *Lancaster's* case (1), and I should be glad if I could follow it in this

case. The essence of his decision is—slightly altering the reported words, in order to avoid an ambiguity :

The words "settlement shall be made" seem to me to point to settlement of the claim against the seller for his default, and not clearly, or at all, to indicate a payment by the buyer who is not in default.

So in the present case I think the words of cl. 9 (f) can, and ought to, A be read as meaning that the difference to be paid in cash shall be the difference between the contract price and the higher market price—that is, settlement of the buyer's claim for damages. If, however, properly construed, the words do clearly include a provision that, if the market price has fallen lower than the contract price, the buyer shall pay the B difference to the seller, then I would adopt the further view of SCRUTTON, L.J. He adds to the passage I have cited, at p. 234 :

Any other construction seems to make the transaction simply a bet, in which the seller bets that the market price will have dropped below the contract price by the notional date of performance, and the buyer bets it will have risen, and the loser pays the amount by which the winner wins. C

I agree with this, and I do not think that the seller can enforce such a bet in these courts by clothing his wager in the demure attire of a c.i.f. contract. Ordinarily, a wager may be defined as an agreement by which each of the parties promises to give money to the other according to the issue of an uncertain event. However, the promise of one may be D a wager, though that of the other is not. It is not essential that there should be mutual conditional promises. If, for instance, A agrees with B to sell him a ton of pepper for £X provided that B promises to pay him £Y if a particular horse wins the Derby, B's promise will be a wager. E In the present case, the buyer's promise to pay the difference if the price of pepper falls before a certain date is clearly a promise to give money to the seller upon the issue of an uncertain event. It cannot be rescued from the category of "wager" by any suggestion that it is the agreed measure of damages for breach of contract, for the breach of contract is by him who is to receive, not by him who is to pay. F It cannot be treated as merely providing the machinery for carrying out the seller's contract to deliver, on the theory that it is immaterial whether the seller or the G buyer gets the goods from "the market," for it will apply when neither of them can get them, and, for reasons I have indicated, it is almost certain that it will be used by the seller only when neither of them can get them. Lastly, it is a bargain that does not possess the essential qualities of the one species of aleatory contract which the law recognises as enforceable—namely, a contract of insurance. In short, as I see it, the promise of the buyer is simply a wager.

It is provided by the Gaming Act, 1845, s. 18, as follows : H

All contracts or agreements . . . by way of gaming or wagering, shall be null and void. . . .

I do not gather that the appellant relied upon this before the arbitrator, nor did his counsel before us. If a contract in appearance has none of the features of a wager, one who seeks to say that it has in reality that

quality must plead the statute, and must prove the fact. However, if it is apparent to the court that a contract sought to be enforced is within the mischief of the statute, it is the duty of the court to give effect to the statute: *Brogden v. Marriott* (6) and *Luckett v. Wood* (7). If, unfettered by the previous decision of this court, we could do so, I think

A we ought in this case to act upon that principle.

I may add that in fact I have a suspicion that the whole of the c.i.f. contracts of sale in this case were really only part of a gamble in differences. The subject-matter is pepper. Being struck by the magnitude of transactions in a commodity of notoriously small individual consumption, I asked a question during the argument, and was told by counsel that the world's consumption of pepper in a year is 12,000 tons. That was a startling figure. It was even more startling to observe that a single trader, the present appellant, in the course of a few months was purchasing more than one-twentieth of the whole world's annual requirements of this pungent condiment. I have this suspicion. However, I am concerned to consider the effect of this type of clause upon general principles, and I leave out of account any inference I might draw in this case from the above facts.

D FINLAY, L.J.: I also have arrived at the conclusion that we are bound by authority to dismiss this appeal. It is unnecessary that I should restate the facts, which are to be found in the award in the form of a special case. The question in issue is as to the proper construction of cl. 9 (f), which I need not re-read. Since this clause was the subject of decision in the Divisional Court in *Lang v. Crude Rubber Washing Co.* (5), it has been slightly amended, but I have anxiously compared the clause as it was when adjudicated on in *Lang's* case (5) and the clause as it stands to-day, and I have arrived at the conclusion that there is no material alteration. *Lang's* case (5) was a decision of a Divisional Court, and does not, therefore, as such, bind us. Nevertheless, it has been expressly approved in the Court of Appeal both by BANKES, L.J., and by SARGANT, L.J. In *Lang's* case (5), HAMILTON, J., states without qualification that the words "The buyer shall close" are mandatory. It is further necessary to consider *Lancaster v. Turner (J. F.) & Co., Ltd.* (1). There the clause in question was a clause in the London Corn Trade Association's form. The language is not precisely the same, but, comparing the clause in that case with the clause now in question, I have arrived at the conclusion that there is no material difference. Further, it is clear, I think, that BANKES and SARGANT, L.J.J., who formed the majority, both regarded *Lang v. Crude Rubber Washing Co.* (5) as being well decided, and as being an authority directly in point. I may quote one sentence from *Lancaster's* case (1), at p. 238:

the case of *Lang v. Crude Rubber Washing Co.* (5) before the Divisional Court in Dec., 1911, of which a full report has been placed before us, is a clear authority in favour of the sellers.

If I am right in thinking that the clauses in *Lang's* case (5) and in *Lancaster's* case (1) are not in any material point different from the clause in the present case, it seems to me to follow that we are bound by authority to decide this case in favour of the respondents. I was for a time attracted by an alternative argument of Mr. Miller's that, since this is a case of insolvency, the matter falls within cl. 11, and is thereby excluded from cl. 9 (f). However, I have come to the conclusion that this argument is unsound, and for the reason assigned by SLESSER, L.J., which I need not repeat. A

I do not discuss at any length an authority which binds us, and I would only add this. In *Lancaster v. Turner (J. F.) & Co., Ltd.* (1), SCRUTTON, L.J., delivered a vigorous dissenting judgment. That the view which we are bound by authority to take may lead to remarkable results can hardly be doubted. It is quite unnecessary to search for illustrations. The present case, where the buyer has been ordered to pay to the seller—admittedly in default—a sum of £5,520 9s. 1d., affords a cogent illustration. This matter is both important and difficult, and I echo the hope of MACKINNON, L.J., that the House of Lords may perhaps have an opportunity of considering whether the view of the majority in *Lancaster's* case (1) or the contrasted view of SCRUTTON, L.J., is correct. I agree that the judgment of the judge must be affirmed, and this appeal dismissed. B

Appeal dismissed with costs. Leave to appeal to the House of Lords. C

Solicitors: *Rehder & Higgs* (for the appellant); *Simmons & Simmons* (for the respondents). D

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.] E

CHUNG CHI CHEUNG v. R. F

[PRIVY COUNCIL (Lord Atkin, Lord Macmillan, Lord Porter, Sir Lancelot Sanderson and Sir George Rankin), **October 17, 18, December 2, 1938.**] G

Privy Council—Hong Kong—Criminal law—Jurisdiction—Foreign warship in British territorial waters—Murder of captain on board by one of the crew—Arrest of accused by Hong Kong police—No request made by foreign government for his surrender to them—Waiver of immunity—Jurisdiction of Hong Kong court. H

The appellant, a cabin boy on board the *Cheung Keng*, an armed customs cruiser in the service of the republic of China, shot and killed the captain of the cruiser, seriously wounded the chief officer, and finally shot and wounded himself. Both the murdered man and the appellant were British nationals in the service of the Chinese government, and, at the time the crime was committed, the vessel was in Hong Kong territorial waters. The appellant was arrested by the Hong Kong water police, who came aboard the *Cheung Keng* in response to a signal from that ship. At the trial in the Supreme Court of Hong Kong, it was contended on behalf of the appellant that, as the murder

took place on an armed public vessel of a foreign government, the British court had no jurisdiction in the matter:—

- A** HELD: a public ship in foreign waters is not, and is not treated as, territory of her own nation. While the domestic courts, in accordance with principles of international law, will accord to the ship, its crew, and its contents certain immunities, these immunities do not depend upon an objective extritoriality, but on implication of the domestic law. They are conditional, and can, in any case, be waived by the nation to which the public ship belongs. The circumstances of this case made it plain that the British court acted with the full consent of the Chinese government, and there was no valid objection to the jurisdiction.

- [EDITORIAL NOTE.]** The Privy Council here consider, in relation to the criminal jurisdiction of colonial courts, the theory that a public ship of a nation is to be treated as a part of the territory of the flag state, or, as often expressed, “a floating portion of the flag state”—the floating island theory. This theory is rejected, as not providing for very obvious possibilities of the actualities of life on board ship and ashore. The theory may well apply as between members of the crew on board ship, but breaks down when applied to visitors to the ship or to the crew going ashore. The position is properly treated as a special case of the immunities enjoyed by a foreign sovereign state.

AS TO THE LIMITS OF CRIMINAL JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 55-65, paras. 61-80; and FOR CASES, see DIGEST, Vol. 14, pp. 137-141, Nos. 1090-1139.]

Cases referred to:

- D** (1) *The Exchange* (1812), 7 Cranch. 116.
 (2) *The Parlement Belge* (1880), 5 P.D. 197; 11 Digest 537, 394; 42 L.T. 273.
 (3) *Compania Naviera Vascongada v. Cristina, The Cristina*, [1938] A.C. 485; [1938] 1 All E.R. 719; Digest Supp.; 107 L.J.P. 1; 159 L.T. 394.

- E** APPEAL *in forma pauperis* by special leave from a judgment of the Full Court of Hong Kong (SIR ATHOLL MACGREGOR, C.J., LINDSELL and ALABASTER, JJ.), dated Sept. 15, 1937, dismissing an appeal by the appellant from a verdict and sentence of death passed on him in the Supreme Court of Hong Kong (SIR ATHOLL MACGREGOR, C.J.) on Aug. 24, 1937.

- F** *H. J. Wallington, K.C.*, and *Eric V. E. White* for the appellant.
The Attorney-General (Sir Donald Somervell, K.C.) and *Kenelm Preedy* for the respondent.

- G** *Wallington, K.C.*: The ship was part of the territory of China, and, even if that is not so, it was the public property of the Chinese government, and was free of all local jurisdiction, either as to the ship or anything on it or as to the crew. The ship could not be invaded for purposes of arrest. If the right to immunity of the ship includes the immunity of the crew, it requires much more than what the chief officer did to waive the immunity of the ship in such a case as this one. [Counsel referred to *The Parlement Belge* (2), *The Exchange* (1) and *The Cristina* (3), and also to DICEY'S CONFLICT OF LAWS, 5th Edn., p. 54, para. 8, WHEATON'S INTERNATIONAL LAW, 6th Edn., Vol. 1, pp. 239, 247, 248, OPPENHEIM'S INTERNATIONAL LAW, 5th Edn., Vol. 1, p. 357, para. 172, and p. 666, para. 450, LAWRENCE'S PRINCIPLES OF INTERNATIONAL LAW, 7th Edn., pp. 227, 228, HALL'S INTERNATIONAL LAW, 8th Edn., p. 245,

788 [DEC. 24, 1938] ALL ENGLAND LAW REPORTS ANNOTATED [Vol. 4
para. 55, and PITT COBBETT'S CASES ON INTERNATIONAL LAW,
5th Edn., Vol. 1, p. 260.]

White followed on the same side.

The Attorney-General: A foreign warship in territorial waters is not to be regarded for all purposes as a floating piece of territory of the country to which it belongs. The territorial jurisdiction of Hong Kong A was exercisable in respect of the crime committed, unless the Chinese government, through the proper authority, claimed to exercise jurisdiction, under the principle admittedly applicable to ships of war in foreign waters. The immunity accorded to public vessels from the exercise of jurisdiction over them when within the waters of the receiving B state is based upon the consent of the receiving state to waive the exercise of that complete, exclusive territorial jurisdiction which it possesses, and the immunity thus accorded can be waived, and was waived in the circumstances of this case. By the Treaty of Tientsin, 1858, China renounced jurisdiction over offences committed by British subjects C within her territory. The immunity accorded to the cruiser and her crew can only be claimed by the Chinese government or its accredited representative, or by the officer in command of the cruiser. It cannot be claimed by the appellant as a British subject at all. [Counsel referred to the report of the Royal Commission on Fugitive Slaves, 1876, pp. 37-43, D HALL'S INTERNATIONAL LAW, 8th Edn., p. 218, and OPPENHEIM'S INTERNATIONAL LAW, 5th Edn., Vol. 1, p. 620.]

Wallington, K.C., in reply.

LORD ATKIN: This is an appeal from the Full Court of Hong Kong E dismissing an appeal by the appellant from his conviction and sentence at a trial in the Supreme Court of Hong Kong before SIR ATHOLL MACGREGOR, C.J., and a jury. The appellant was convicted of the murder of Douglas Lorne Campbell, and was sentenced to death. The murder was committed on board the Chinese maritime customs cruiser F Cheung Keng while that vessel was in Hong Kong territorial waters. Both the murdered man and the appellant were in the service of the Chinese government as members of the officers and crew of the cruiser. The former was captain, the appellant was cabin boy. Both were British nationals. At the trial, the point was taken that, as the murder G took place on an armed public vessel of the foreign government, the British court had no jurisdiction in the matter. The contention was overruled by SIR ATHOLL MACGREGOR, C.J., at the trial, and, on appeal, his decision was upheld by the Full Court over which he presided.

In order to elucidate the legal position, it will be necessary to make H a short statement of the material facts. On Jan. 11, 1937, the accused shot and killed the captain. He then went up the ladder to the bridge, and shot and wounded the acting chief officer, and then went below and shot and wounded himself. The acting chief officer, as soon as he was wounded, directed the boatswain to proceed to Hong Kong at full

speed and hail the police launch. He wanted help from the Hong Kong police, he said, to arrest the accused. Within a couple of hours, the launch of the Hong Kong water police came alongside in answer to the cruiser's signal. The police took the wounded officer and the accused to hospital. They took possession of the two revolvers with which the

A accused had armed himself, the spent revolver bullets and expended shells, and some unexpended cartridges. On Feb. 25, extradition proceedings were commenced against the accused on the requisition of the chairman of the provincial government of Kwangtung, alleging murder and attempted murder on board the Chinese customs cruiser :

B within the jurisdiction of China while the said cruiser was approximately one mile off Futaumun (British waters).

This appears to be an allegation that the vessel had not at the time reached British territorial waters. The fact that the crime was in reality committed within British waters is not now in dispute. After many

C adjournments, the magistrate decided, on evidence called for the defence, that the accused was a British national, and that the proceedings therefore failed. The accused was at once re-arrested and charged with murder "in the waters of this colony," and duly committed. At the hearing before the magistrate, and at the trial, the acting chief officer

D and three of the crew of the Chinese cruiser were called as witnesses for the prosecution. Police witnesses produced, and gave evidence as to, the revolvers, cartridge cases and bullets. As has already been stated, the accused was convicted, and sentenced to death.

On the question of jurisdiction, two theories have found favour with

E persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There

F will, therefore, be no jurisdiction in fact in any court where jurisdiction depends upon the act in question or the party to the proceedings being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic courts, in accordance with principles

G of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well-settled, though others are in dispute. In this view, the immunities do not depend upon an objective extritoriality, but on implication of the domestic law. They are conditional, and can, in any case, be waived by the nation to which

H the public ship belongs.

Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing

offenders within its boundaries. It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. A
The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue, they seek to ascertain the relevant rule, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, B
then, are the immunities of public ships of other nations accepted by our courts, and on what principle are they based ?

The principle was expounded by that great jurist MARSHALL, C.J., in *The Exchange* (1), a judgment which has illumined the jurisprudence of the world, at p. 136 : C

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent D
may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction ; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. . . . E

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Then MARSHALL, C.J., proceeds to illustrate the class of cases to which he has referred. He takes first "the exemption of the person of the sovereign from arrest or detention within a foreign territory," and, F
secondly, "standing on the same principles as the first is the immunity which all civilised states allow to foreign ministers" (p. 138) :

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides ; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it. G

The judgment then proceeds to the third case, at p. 139

in which a sovereign is understood to cede a portion of his territorial jurisdiction [namely] where he allows the troops of a foreign power to pass through his dominions. H

It is laid down by MARSHALL, C.J., at p. 140 :

The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

He points out that, differing from the case of armed troops, where an

express licence to enter foreign territory would not be presumed, the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn. When in foreign waters, private vessels are, he points out at pp. 144, 145, subject to the territorial jurisdiction :

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation ; acts under the immediate and direct command of the sovereign ; is employed by him in national objects. He has many and powerful motives for preventing these objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied licence therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality. . . . It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

This conclusion is based on the principles expounded in the extracts from which MARSHALL, C.J., summarised, at p. 143 :

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory ; that this consent may be implied or expressed ; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

The judgment then proceeded to apply the principles stated to the case before the court, and held that the former owners of the *Exchange*, which had been captured by the French and entered the port of Philadelphia under stress of weather, could not have a decree to recover the vessel, which must be treated as an armed public vessel of the Emperor of the French, whose title could not be controverted in the American court.

The extreme doctrine of extraterritoriality was not in issue in *The Exchange* (1), and neither the principles enunciated by MARSHALL, C.J., nor his application of them appears to support it. In this country, the question arose in acute form in 1875 over instructions issued by the Admiralty to commanders of Her Majesty's ships in respect of the treatment of fugitive slaves. They were attacked by Sir William Vernon Harcourt, then Whewell Professor of International Law at Cambridge and Liberal M.P. for Oxford, in two letters to *The Times* under the title "Historicus." He there stated (Nov. 4, 1875) that :

I have seen with much surprise that the doctrine of the absolute immunity of a public ship, and all persons and things on board of it, from local jurisdiction and the operation of local law when lying in the territorial waters . . . has been treated as a doubtful proposition. I had certainly supposed that in the whole range of Public Law there was no position more firmly established by authority, more universally admitted by Governments, or one which had been more completely accepted in the intercourse of states as unquestioned and unquestionable.

The government appointed a Royal Commission to report on the whole question of the reception of fugitive slaves, which included such eminent lawyers as Sir Alexander Cockburn, C.J., Sir Robert Phillimore, Mr. Montague Bernard, Mr. Justice Archibald, Mr. Alfred Thesiger, K.C., Sir Henry Maine, Mr. James Fitzjames Stephen, K.C., and Mr. Henry

C. Rothery, the registrar in Admiralty. The lawyers were not agreed as to the doctrine of international law, and the commission were able to report without expressing any decided opinion about it. The lawyers, however, wrote memoranda which were annexed to the report. Sir Robert Phillimore, Mr. Bernard and Sir Henry Maine appeared to favour the more extreme doctrine, but admitted that it must have qualifications. A
 Sir Alexander Cockburn, C.J., in a memorandum which is worthy to be compared with the judgment of MARSHALL, C.J., discussed the whole question of extritoriality of a public ship of war, quoting the authorities from 1740 onwards and referring to cases of government action. He quotes Casaregis, 1740, DISCURSUS DE COMMERCIO, Hubner, 1759, DE LA B
 SAISIE DES BATIMENTS NEUTRES, Lampredi, Pinheiro Ferreira, Azueri, Lord Stowell's advice to the British government in 1820 in *Brown's* case, Wheaton, Hautefeuille, DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES, Ortolan, DIPLOMATIE DE LA MER, Bluntschli Heffter and Calvo. Of these, Hubner, Hautefeuille, Ortolan and Calvo support in C
 his view the high doctrine of extritoriality, Casaregis and Wheaton are non-committal, and the others are against the doctrine. After controverting the views which favour complete extritoriality, and after pointing out the difficulties, and, indeed, absurdities, to which the doctrine leads, he says : D

The rule which reason and good sense would as it strikes me prescribe would be that as regards the discipline of a foreign ship and offences committed on board as between members of her crew towards one another matters should be left entirely to the law of the ship, and that should the offender escape to the shore he should if taken be given up to the commander of the ship on demand and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject or if a crime having been committed on shore the criminal gets on board a foreign ship he should be given up to the local authorities. E
 In which way the rule should be settled so important a principle of international law ought not to be permitted to remain in its present unsettled state.

In this passage, which was cited with approval by the Full Court of Hong Kong in the present case, it should be observed that SIR ALEXANDER COCKBURN, C.J., assumes that, even if a crime be committed on board by one member of the crew on another, should the offender escape to shore and no demand be made for his return, the territorial court will have jurisdiction. Their Lordships doubt whether, when he is dealing with the case of a crime committed on board on a local subject, he has present to his mind the possibility of the local subject being a member of the crew. G
 Moreover, while he says that in the cases put the offender should be given up to the local authorities, he does not say whether, if surrender were refused, judicial process could be directed to the captain of the foreign vessel to secure the custody of the offender by the local authority. H
 In the memorandum of SIR ALEXANDER COCKBURN, C.J., ARCHIBALD, J., concurred. Mr. Stephen wrote a memorandum to the same effect in the trenchant Stephen style. Mr. Rothery treated the dogmatic assertion of "Historicus" and his authorities to a merciless dissection to which the conclusions of a Whewell professor can seldom

have been subjected. In addition to the authorities already mentioned, reference should be made to the passages cited in the judgment of the Supreme Court in this case from HALL'S INTERNATIONAL LAW, 8th Edn., 1924, edited by Professor Pearce Higgins, para. 55. There the author states that a public vessel is exempt from the territorial jurisdiction, but
A that her crew and persons on board of her cannot ignore the laws of the country in which she is lying as if she were a territorial enclave. Exceptions to their obligation exist in the case of acts beginning and ending on board the ship and taking no effect externally to her in all matters in which the economy of the ship is, or the relations of persons on board
B to each other are, exclusively concerned. The author appends a note, at p. 245 :

The case which, however, would be extremely rare on board a ship of war, of a crime committed by a subject of the state within which the vessel is lying against a fellow subject, would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal.

C The other passage is from OPPENHEIM'S INTERNATIONAL LAW, 5th Edn., 1937, edited by Professor Lauterpacht, Vol. 1, para. 450. The author adopts the full extraterritorial view (p. 666) :

D The position of men-of-war in foreign waters is characterised by the fact that they are called "floating portions of the flag state." For at the present time there is a customary rule of International Law, universally recognised, that the state owning the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag state.

When, however, he is dealing with the analogous immunities of diplomatic envoys, he says, at para. 389 (p. 619) :

E Extraterritoriality in this as in every other case is a fiction only, for diplomatic envoys are in reality not without but within the territories of the receiving states.

There is a note, at p. 620 :

The modern tendency among writers is towards rejecting the fiction of extraterritoriality.

F This note is not in the second edition, the last prepared by the author, and appears for the first time in the fourth edition, edited by Professor McNair.

Their Lordships have no hesitation in rejecting the doctrine of extraterritoriality expressed in the words of Mr. Oppenheim, which regards
G the public ship "as a floating portion of the flag state." However the doctrine of extraterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make
H the doctrine quite impracticable when tested by the actualities of life on board ship and ashore. Immunities may well be given in respect of the conduct of members of the crew to one another on board ship. If one member of the crew assaulted another on board, it would be universally agreed that the local courts would not seek to exercise jurisdiction, and would decline it, unless, indeed, they were invited to exercise it by

competent authority of the flag nation. However, if a resident in the receiving state visited the public ship and committed theft and returned to shore, is it conceivable that, when he was arrested on shore, and shore witnesses were necessary to prove dealings with the stolen goods and identify the offender, the local courts would have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses, or to compel their testimony in advance or otherwise. He naturally would leave the case to the local courts. On this hypothesis, however, the crime has been committed on a portion of foreign territory. The local court then has no jurisdiction, and this fiction dismisses the offender untried and untriable, for it is a commonplace that a foreign country cannot give territorial jurisdiction by consent. Similarly in the analogous case of an embassy. Is it possible that the doctrines of international law are so rigid that a local burglar who has broken and entered a foreign embassy, and, having completed his crime, is arrested in his own country, cannot be tried in the courts of the country? It is only necessary to test the proposition to assume that the foreign country has assented to the jurisdiction of the local courts. Even so, objective extritoriality would, for the reason given above, deprive our courts at any rate of any jurisdiction in such a case. The result of any such doctrine would be, not to promote the power and dignity of the foreign sovereign, but to lower them, by allowing injuries committed in his public ships or embassies to go unpunished.

On this topic, their Lordships agree with the remarks made by Professor Brierly in *THE LAW OF NATIONS*, 1928, p. 110 :

The term "extritoriality" is commonly used to describe the status of a person or thing physically present in a state's territory, but wholly or partly withdrawn from that state's jurisdiction by a rule of international law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is in fact within, and not outside, the territory: it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only a metaphor and to deduce untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has some immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends.

The true view is that, in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys and public ships, and the naval forces carried by such ships, certain immunities. Some are well settled, others are uncertain. When the local court is faced with a case where such immunities come into question, it has to decide whether or not, in the particular case, the immunity exists. If it is clear that it does, the court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute—the crew of a warship—it is evident that the immunities extend to internal disputes between the

crew. Over offences committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction. The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction. What the precise limits of the immunities are it is not necessary to consider. Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offences on land. It is not necessary for their Lordships to consider these. In the present case, the question arises as to the murder of one officer and the attempted murder of another by a member of the crew. If nothing more arose, the Chinese government could clearly have had jurisdiction over the offence, and, though the offender had, for reasons of humanity, been taken to a local hospital, a diplomatic request for his surrender would appear to have been in order. It is difficult to see why the fact that either the victim or the offender or both are local nationals should make a difference if both are members of the crew. This request, however, was never made. The only request was for extradition, which is based upon treaty and statutory rights, and, in the circumstances, inevitably failed. Nevertheless, if the principles which their Lordships have been discussing are accepted, the immunities which the local courts recognise flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign court over his rights of property. Here is no question of saying: "You may treat an offence committed on my territory as committed on yours." Such a statement by a foreign sovereign would count for nothing in our jurisprudence. However, a sovereign may say: "You have waived your jurisdiction in certain cases, but I prefer in this case that you should exercise it." The original jurisdiction in such a case flows afresh.

Applying these considerations to the present case, it appears to their Lordships as plain as possible that the Chinese government, once the extradition proceedings were out of the way, consented to the British court exercising jurisdiction. It is not only that, with full knowledge of the proceedings, they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British court in aid of the prosecution. That they had originally called in the police might not be material if, on consideration, they decided to claim jurisdiction themselves, but the circumstances stated, together with the fact that the material instruments of conviction—the revolver bullets, etc.—were left without demur in the hands of the Hong Kong police, make it plain that the British court acted with the full consent of the Chinese government. It therefore follows that there was no valid objection to the jurisdiction, and the appeal fails. There was a further point raised by the Crown as to the possible effect of the Treaty of Tientsin

in 1858, in renouncing jurisdiction by Chinese over British subjects who committed crimes in China. The Supreme Court was prepared to decide in favour of the Crown on this point also, but, in view of the opinion already expressed on the main point, it is unnecessary to decide this, and no opinion is expressed upon it. For the above reasons, their Lordships will humbly advise His Majesty that this appeal be dismissed. *Appeal dismissed.* A

Solicitors: *Reid Sharman & Co.* (for the appellant); *Burchells* (for the respondent).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.] B

VOWLES v. ARMSTRONG-SIDDELEY MOTORS, LTD.

[COURT OF APPEAL (Slessor, MacKinnon and Finlay, L.J.J.), November 21, 1938.] C

Factories—Dangerous machine—Absolute duty to fence—Plaintiff injured by guillotine machine—Findings by jury that plaintiff not negligent and that machine securely fenced—Whether findings mutually exclusive—Factory and Workshop Act, 1901 (c. 22), s. 10 (1) (c). D

The plaintiff was injured while working on a guillotine machine, which was fitted with a guard in front of the knife. There was a gap of seven-sixteenths of an inch between the bottom of the guard and the bed-plate. Above the lower edge of the knife, there was an unguarded space, through which it was possible for a man to put his fingers. The jury found that the machinery was securely fenced, that the plaintiff did not materially contribute to the cause of the accident, and that the defendants were not negligent either in not fitting a guard above the knife, or in not making sure that the existing guard was properly secured:— E

HELD: the duty to fence is an absolute one, and a machine must be provided with such a guard that it is safe even in the case of an inadvertent act on the part of the workman. The verdicts were, therefore, mutually exclusive and contradictory, and a new trial was ordered. F

Sowter v. Steel Barrel Co., Ltd. (2) approved.

[EDITORIAL NOTE.] The importance of this case is that it approves the decision of the majority of the Divisional Court in *Sowter v. Steel Barrel Co., Ltd. (2)*. In that case, a machine that had been used with perfect safety for 24 years was held to be inadequately fenced, although the justices had found as a fact that it was as safe as it would have been if it was securely fenced. The duty to fence is an absolute one, and it would seem that the only defence of the employer is that the workman deliberately used the machine to hurt himself. It seems that no amount of negligence on the part of the workman, and no breach of regulations or instructions, will provide a defence for the employer if the machine is not in fact securely fenced. The present case has hardly provided a suitable opportunity for a full statement of the law as to fencing dangerous machines, but the decision herein strengthens many recent decisions in the Divisional Court where the Factory and Workshop Act, 1901, has been strictly construed against the employer. G

AS TO FENCING DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 65-81.] H

Cases referred to :

- (1) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192 ; 24 Digest 909, 71 ; 66 L.J.Q.B. 173 ; 76 L.T. 159.
- (2) *Sowter v. Steel Barrel Co., Ltd.* (1935), 154 L.T. 85 ; Digest Supp.
- (3) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132 ; Digest Supp. ; 103 L.J.K.B. 465 ; 151 L.T. 87 ; *reversd. on other grounds*, [1936] A.C. 206.
- (4) *Senior v. Ward* (1859), 1 E. & E. 385 ; 36 Digest 137, 910 ; 28 L.J.Q.B. 139 ; 32 L.T.O.S. 252.
- (5) *Metropolitan Ry. Co. v. Wright* (1886), 11 App. Cas. 152 ; 36 Digest 85, 565 ; 55 L.J.Q.B. 401 ; 54 L.T. 658.

A

B

APPEAL AND CROSS-APPEAL from a decision of PORTER, J., sitting with a special jury at Birmingham, dated Mar. 16, 1938. The facts of the case are fully set out in the judgments.

A. S. Ward and *W. P. Doyle* for the appellants, the plaintiffs.

R. H. Morris and *Eric White* for the respondents, the defendants.

C

SLESSER, L.J. : In this case, the infant plaintiff, who was in the employment of the defendants, was working at a machine at the defendants' factory when his hand was cut by the blade of the machine, and he suffered the loss of four fingers of his right hand. He sued the defendants, alleging a breach of statutory duty—namely, the Factory and Workshop Act, 1901, s. 10 (1) (c), which provides that :

D

All dangerous parts of the machinery . . . must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced . . .

E

Alternatively, he based his claim upon negligence.

The apparatus, known as a guillotine, was of the familiar type consisting of a bench and moving knife pivoted at one end, the latter being put in mechanical action by a pedal. The blade has in front of it, on the lower side, a guard of angle-iron allowing seven-sixteenths of an inch below it for the metal to be cut to pass under the blade. Above the lower edge of the knife, there was a space, unguarded, with room for the fingers of the operative to be put over the top of the guard, and so, while holding the material to be cut, to come under the knife.

F

G

The defendants deny the breach of statutory duty and negligence, and allege that the injury to the infant plaintiff was caused by his own act of negligence. The material facts of the case are that the infant plaintiff, in order to prevent dust getting into a borax and spelter box which he was using, decided to make a cover out of sheet metal, and, for this purpose, went to the guillotine machine with a piece of metal which

H

he intended to cut. He marked off the corners and cut one edge successfully, but, according to his statement, while holding the metal to make the second cut, he felt a sliding motion and, at the same time, pressing the pedal, the blade cut off his fingers. There is, as I have said, a guard where the blade descends, and it is common ground that, unless the screw which holds that guard was loose, as was alleged by the plaintiff,

the boy's hand could not have got underneath and been cut by the knife. It appears that, if the screw had been absent altogether, the boy's hand could possibly get underneath and be cut by the knife.

The jury were asked a number of questions by the judge, one of which was: "Was the machinery properly maintained in that the angle-iron was kept secure?" To this the jury answered: "Yes." They therefore must be taken to have found, on the uncontradicted evidence, that, the angle-iron being secure, the boy could not have pushed his hand in through the seven-sixteenths aperture underneath the blade, and so disbelieved him to that extent. It follows, therefore, that the jury must have found in favour of the employers' contention—namely, that the boy brought his hand into contact with the blade by bringing it under the blade through the space above the lower edge of the knife, and that his hand was in that position when the accident happened. On that assumption, the question arose whether the employers ought not to have fenced the space above the blade as well as the space below it, and in that connection the jury were asked: "Was the machinery securely fenced, having regard to the fact that it had no mesh protection as is now provided?" This has reference to the fact that the machine is admittedly now fenced so that nobody's fingers can get over the top. To this the jury answered, "Yes," which I think must be taken to mean that there was no danger involving a statutory necessity to fence so as to prevent a man from putting his fingers over the top.

This view presumably must have been arrived at on some such assumption as that stated by WILLS, J., in *Hindle v. Birtwistle* (1), at p. 195, that machinery is to be taken to be dangerous only:

... if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection.

This finding, without more, would lead one to the conclusion that, no danger being reasonably anticipated from placing a hand above the cutter, if a man did so place his hand and suffer injury, he would be the cause of his own damage. However, the jury, on this view, have made the matter more difficult by finding, in answer to a specific question, that the infant plaintiff did not materially contribute to the cause of the accident. Apart from the question of statutory liability, they also found that the defendants were not negligent in failing to put up the upward mesh guard, nor in making sure that the lower guard angle-iron was properly secured. As to the latter conclusion, their earlier finding was, as I have indicated, that the guard was properly secured, and, therefore, no question of negligence could arise. As to the former, it may well have been that the jury came to the conclusion that the failure to place an upward mesh guard was not actionable, in that an accident arising from its absence was not one which the defendants could reasonably be required to anticipate. The real difficulty in the case, therefore, arises from the effect of the two answers (i) that the infant plaintiff did not materially contribute to the cause of the accident,

and (ii) that the machinery was securely fenced, notwithstanding the fact that it had no mesh protection—that is, no upper guard.

A On these answers, the judge gave judgment for the defendants. The plaintiff appeals, on the ground that the two findings of the jury which I have above quoted are perverse, in that they are mutually contradictory. Mr. Doyle, for the appellants, asks the court to follow the view expressed by the Divisional Court in *Sowter v. Steel Barrel Co., Ltd.* (2), to the effect that the duty to make safe dangerous parts of the machinery means actual safety—that is to say, to guard against the cases where, as was said by LORD HEWART, L.C.J., at p. 87 :

B . . . by reason of carelessness, indolence or haste, workmen sometimes omit to observe instructions. Where machinery is dangerous, they are to be saved even from themselves.

C Mr. Doyle also maintains that, it being here found that the workman did not materially contribute to the cause of the accident, it must follow that the machinery must have been dangerous, in that its upper part was unfenced, and no protection was afforded against carelessness, indolence, or haste or other inadvertence, and he maintains that, if it was so unfenced, there was a breach of the statutory duty. In the D face of this apparent dilemma, I think that it is important to endeavour to ascertain what the jury meant by their answer. The judge, in summing up, said to the jury :

E If the accident did occur by reason of the hand getting over the top [a view which I have indicated they must have taken], then you have to ask yourselves whether that was such negligence as was a material contributing cause of the accident. . . . If in your view he [the plaintiff] at the time must have recognised that he was taking a very dangerous risk, you would be entitled to say that it was that risk that he took which was a material contributory cause of the accident and, therefore, he cannot recover.

F Again, he directed them that the defendants were liable if they did not securely fence, unless the boy's own act was the cause of the injury which he has suffered. The jury, after retiring, sent a note to the judge saying that they were unanimously agreed that the machinery was securely fenced, but that the infant plaintiff did not contribute by his negligence to the accident, and asked the question : " Does this G amount to a verdict for the defendants ? " It was on this that the judge asked the specific questions which I have mentioned. The result of it all would seem to be that the jury have found that the infant plaintiff did not realise the danger of his act, and, therefore, must have considered that he acted inadvertently. The failure to guard against H such inadvertence, if *Sowter's* case (2) is rightly decided, would indicate a failure on the part of the employers to guard against machinery which, so far as the upper part was concerned, was dangerous. On this point, therefore, the case involves a consideration of that authority.

It is to be observed, in the first place, as has often been pointed out, that the duty to fence is absolute. Unlike the case of negligence, where there has been a failure of statutory duty, the employer can only defend

himself by showing that such failure is not the cause of the accident, but that the proximate cause is the plaintiff's own act: *per* LORD WRIGHT in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (3), at p. 214. In *Sowter's* case (2), LORD HEWART, L.C.J., points out, at p. 87:

In this case the machine, at the time of the accident, was not safe at all. It is not suggested that the workman deliberately put his hand into the machine in order to hurt himself. On the contrary, his hand was accidentally caught in the machine in the course of his using it for the purpose of doing the very work which he was employed, by means of it, to do.

The dissenting judgment in that case, that of LAWRENCE, J., points out that the justices had found as a fact that the protection of the press was such as to be as adequately safe as it would have been if it were securely fenced, and that the machine had been safely in use for 24 years. No such considerations can be urged here, for, if the proper view be, in the absence of wrongful act by the infant plaintiff, that the upper part of the machine, through which a man might as well hold his work steady as through the lower part, was dangerous, in that any inadvertent act on the part of the operator might bring his hand into contact with the machine, there is no question of adequately safe fencing of the upper part. There was no fencing at all.

Having regard to the jury's conclusions, I see nothing to distinguish this case on that view from *Sowter's* case (2), with which decision, including the reasons given by LORD HEWART, L.C.J., I agree. *Sowter's* case (2) is, I think, supported by the opinion of LORD WRIGHT in *Flower's* case (3), at p. 214, where he distinguishes between the deliberate operative act of the workman constituting what has been called, I think, somewhat inaccurately, "contributory negligence," and the case, as here, of an error of judgment. See also *Senior v. Ward* (4), a case of wilful and reckless disregard of rules.

In view of the findings of the jury that there was no breach of statutory duty in not putting an upward mesh guard, I do not think it possible for the appellants to have judgment, but I have come to the conclusion that there ought to be a new trial, on the ground that the finding of the jury that there was no statutory duty to fence the upper space is one which the jury could not reasonably find alongside of their finding that the infant plaintiff had not materially contributed to the accident. I think that the findings of the jury indicate, in the language of LORD HALSBURY in *Metropolitan Ry. Co. v. Wright* (5), at p. 156, that their conclusions are absolutely unreasonable, and cannot stand. This appeal must be allowed and a new trial ordered, the new trial to be without a jury.

MACKINNON, L.J. : The plaintiff was an employee of the defendants. On June 14, 1937, he was using a guillotine machine at their works to cut a small piece of sheet metal. The machine is an iron table with a back to it. Parallel to, and a few inches from, the back is a knife, one

end of which, when the machine is at rest, is raised a few inches from the level of the table. If a piece of sheet metal is placed beneath the knife, and a pedal on the right of the machine near the ground is pressed with the foot, the mechanism causes the knife to descend with much force and shear through the metal sheet. Obviously, this knife, being over the table, and liable to descend on it, would make the machine dangerous. Protection was afforded by an L-shaped piece of metal in front of, and parallel to, the knife. This was fixed by bolts at each end, so that its lower edge was seven-sixteenths of an inch above the level of the table. When in use, the sheet metal would be pushed under the bar into this seven-sixteenths of an inch aperture, but, as the fingers of a workman could not go with the sheet through that aperture, the bar would protect them from that danger. The top edge of this protecting bar did not reach above the lower edge of the knife, at any rate on the left-hand side, and it was possible for a man's fingers to be put over the top of the protecting bar and so beneath the knife into a position of danger from it on its descent. When the plaintiff was using the machine, four fingers of his right hand were cut off by the knife, and he had to have them amputated at the knuckle joints.

The plaintiff's own explanation of this disaster was that the bolts at each end of the protecting bar had been allowed to become loose, so that the seven-sixteenths of an inch aperture had become wider, and wide enough to allow his fingers to go through the aperture. If this had not happened, in fact, it is obvious that his fingers could not have gone beneath the bar, but must have reached the dangerous knife over the top of the bar.

The plaintiff's claim was based on an allegation that the defendants had failed to fence this dangerous machine pursuant to the Factory and Workshop Act, 1901, s. 10. If his story of what happened was accurate—namely, that, the bolts having become loose, the seven-sixteenths inch aperture had become enlarged—then the protecting bar might in its design have been an effective fence; but one that had become ineffective. However, if his story was not accurate, and the bolts were in place, and the aperture beneath the bar too small to let his fingers through, there might then be a question whether this bar, as designed, was an effective fence, seeing that it was possible, as the disaster showed, for his fingers to reach the danger above the bar. Some support for that contention could be derived from the evidence that, after this accident, on the suggestion of a factory inspector, the protection of the bar was improved by having a piece of wire mesh attached along the top of it. The fencing was then obviously complete, beneath the bar by the smallness of the aperture it permitted and above it by the wire mesh. The main question in the case was whether this admittedly dangerous machine was securely fenced within the provision of sect. 10 of the Act of 1901. The defendants alleged that it was, and further, or in the alternative, alleged that the accident was caused by the negligence of

the plaintiff in placing his hand under the knife and operating the pedal when his hand was in that dangerous place.

After a careful and impeccable summing up, the judge left the question of liability to the jury at large. After some discussion in private, the jury returned to court and intimated that they were agreed that the machine was securely fenced and properly maintained, but that the plaintiff did not contribute by negligence to the accident. They asked whether this ought to amount to a verdict for the defendants. Thereupon, the judge asked them the following specific questions, to which I append the jury's answers :

(1) (a) Was the machinery securely fenced having regard to the fact that it had no mesh protection as is now provided ?—Yes. B

(b) Was the machinery properly maintained in that the angle-iron was kept secure ?—Yes.

(2) Did the plaintiff materially contribute to the cause of the accident ?—No.

(3) Were the defendants negligent either in (a) not putting the upward mesh guard ?—No. (b) In not making sure that the angle-iron was properly secured ?—No. C

Upon this, both sides asked for judgment. The judge decided that on these findings he must give judgment for the defendants, and I think that he was right. When Mr. Ward asked for judgment for the plaintiff, he did so upon the ground "that there was no evidence upon which the jury could find their first answer." This clearly was not a tenable contention. However, the argument he developed before us is much more formidable—namely, that the findings of the jury cannot all be right, and are mutually destructive. The findings in (1) (b) and (3) (b) must mean that the angle-bar was properly in place and the aperture beneath it only seven-sixteenths of an inch. Therefore, the plaintiff's fingers cannot have got beneath that bar. Therefore, his fingers must have reached the knife above the bar. They find in (1) (a) and (3) (a), however, that the space through which fingers could go above the bar was securely fenced. If it was so, the passage of the plaintiff's fingers through, over, or in any way to the dangerous side of, that secure fence must have been by his improper or negligent action. Yet they find in (2) that the plaintiff did not materially contribute to the cause of the accident. Conversely, the argument is this. It is found, in effect, that the plaintiff's hand went above the bar to the dangerous place. It is found that the plaintiff did not materially contribute to the cause of the accident. The inevitable conclusion is that the opening through which his hand went could not be securely fenced, since his hand went through it without fault on his part. I confess I see no escape from the conclusion that these findings cannot all stand, and that the findings in favour of the plaintiff and those in favour of the defendants are mutually destructive. That being so, I do not think we can affirm the judgment for the defendants, and equally we cannot accede to Mr. Doyle's appeal to us to enter judgment for the plaintiff. I think that there must be an order for a new trial, and, having regard to the unfortunate experience of this trial by jury, I think that it should be a new trial by judge alone. D
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FINLAY, L.J. : I concur with SLESSER and MACKINNON, L.JJ., in thinking that there must be a new trial in this case, and for the reasons they have assigned. I concur with reluctance, because one feels that it is unfortunate that a new trial should be necessary when a matter has been considered by a special jury after a full direction by a judge which is in no way challenged. This case perhaps illustrates the difficulties of obtaining from a jury satisfactory answers to a series of questions. I also regret the necessity for a new trial because I think that I can see which way the jury intended to find, and would have found if they had simply returned a verdict for the plaintiff or for the defendant. As there is to be a new trial, it is quite obviously undesirable that I should say more on this point. Feeling, as I do, that it is impossible that the answers of the jury should all stand together, I am constrained to agree that the new trial is inevitable.

Appeal allowed with costs. Cross-appeal dismissed with costs. Order for a new trial by judge alone. Costs of first trial to abide result of second.

Solicitors : *Hartleys* (for the appellants); *Berrymans* (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., *Barrister-at-Law.*]

PAINE v. COLNE VALLEY ELECTRICITY SUPPLY CO., LTD., AND BRITISH INSULATED CABLES, LTD.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
November 16, 17, 23, 1938.]

Factories and Shops—Electrical station—Kiosk housing transformer and switches—Defective screening—Breach of statutory duty—Factory and Workshop Act, 1901 (c. 22), Sched. VI, para. (20).

Master and Servant—Duty of master to provide safe place for employee to work in.

Negligence—Dangerous article—Opportunity of examination—Liability of manufacturer to third party.

The first defendants, as suppliers of electricity, conveyed high voltage current to kiosks in which transformers were housed. These kiosks, which had been manufactured and supplied to the first defendants by the second defendants, were arranged in 3 cubicles. In one there was the transformer, in another switches and busbars, and in the third an oil switch. The cubicles were separated by insulating material, but in the particular kiosk in question the insulating material did not extend to the back of the cubicle but left a space of about 6 ins., and one of the busbars in the adjoining cubicle came within 2 ins. of this space. By reason of this faulty construction a workman came into contact with the busbar when it was alive, and was killed. The executrix of the workman sued both the supply company and the manufacturers of the kiosk for breach of common law and statutory duty :—

HELD : (i) the kiosk was an electrical station within the meaning of the Factory and Workshop Act, 1901, Sched. VI, para. (20), and, as there was not efficient screening of the dangerous parts in accordance with the provisions of that Act, there was a breach of statutory duty by the first defendants.

(ii) there was a breach of the common law duty by the first defendants in that they did not provide their employee with a safe place in which to work.

(iii) the manufacturers of the kiosk were not liable, as there had been ample opportunity for examination of the kiosk by the first defendants, and, therefore, the proximate relationship of the manufacturers did not extend beyond their customer, the first defendant, to the workman.

[EDITORIAL NOTE.] The point taken herein on the construction of the kiosks and the provisions of the Factory and Workshop Act, 1901, Sched. VI, is of importance now that the distribution of electrical energy at a high voltage has become so common. It will be noted that there is also a breach of the master's common law duty to provide a safe place for the employee to work in. The case against the manufacturers really failed upon the facts. The kiosks had been delivered some two years before the accident and, if there was a danger in using them, it was shown to be quite possible for the whole kiosk to be rendered "dead" when any work was being done in them, and, by so arranging their work, the electricity supply company could have avoided any danger.

AS TO ELECTRICAL STATIONS UNDER THE FACTORY ACT, see HALSBURY, Hailsham Edn., Vol. 14, p. 565, para. 1073; and FOR CASES, see DIGEST, Vol. 24, p. 902, No. 30.]

Cases referred to :

- (1) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.
- (2) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (3) *Dominion Natural Gas Co., Ltd. v. Collins & Perkins*, [1909] A.C. 640; 36 Digest 28, 142; 79 L.J.P.C. 13; 101 L.T. 359.
- (4) *Otto v. Bolton & Norris*, [1936] 2 K.B. 46; [1936] 1 All E.R. 960; Digest Supp.; 105 L.J.K.B. 602; 154 L.T. 717.

ACTION for damages by the plaintiff as executrix of her son's estate, the claim being made under the Law Reform (Miscellaneous Provisions) Act, 1934. Against the first defendants, Colne Valley Electricity Supply Co., Ltd., who were the employers of the son, the plaintiff alleged breach of statutory duty by non-compliance with the provisions of the Factory and Workshop Act, 1901, and breach of the common law duty of employers to provide a safe and proper place and plant in and with which workmen may carry out their duties. Against the second defendants, British Insulated Cables, Ltd., the manufacturers of the kiosk alleged to be dangerous, the plaintiff alleged that the kiosk had been manufactured in such a way that it was dangerous to workmen using it, and that they must have known that workmen such as the deceased would use it. The facts are fully stated in the judgment.

G. R. Blanco White, K.C., and *G. G. Baker* for the plaintiff.

G. J. Paull and *A. Marlowe* for the first defendants.

F. A. Sellers, K.C., and *R. M. H. Everett* for the second defendants.

GODDARD, L.J. : The facts as I find them are as follow. The first defendants supply electricity to a large area in Middlesex and Hertfordshire and generate or obtain current at high voltage which is conveyed to a number of kiosks, made for them by the second

- defendants. In these kiosks are transformers to transform the current to a lower voltage, at which it is supplied to consumers. This current is led to the transformers and controlled by a set of switches. There is another set of switches in the kiosks through which the high tension current is conveyed to the next kiosk in the distribution system. In a
- A separate cubicle there is an oil switch which is thrown out before work is done on what are called the local switches. When the oil switch and the local switches are thrown out, the upper part of the kiosk is rendered dead, but the lower part remains alive so that work can be done on the oil and local switches without interfering with the supply to the rest
- B of the area. In the kiosk there are three busbars, arranged one behind the other in echelon, which remain alive when the upper switches are thrown out. The kiosk was constructed in cubicles. In one was the transformer, in another the switches and busbars, and in the third the oil switch, the latter cubicle being only 11 ins. wide. Insulating material
- C formed a screen between each cubicle. Between that containing the switches and busbars and that containing the oil switch the screen did not extend the full depth of the cubicle. There was a space of some 6 ins., and one of the busbars, the one further back, came within 2 ins. or 2½ ins. of the screen instead of being 6 ins. away from the space.
- D On the day of the accident work had to be done to the oil switch. Its base had to be removed and cleaned, necessitating undoing 4 bolts and nuts, taking off the base, which weighs some 76 lbs., and then refixing it. To do this work, there attended the mains engineer, an assistant engineer, a fitter, and the deceased who was the fitter's mate. Fitters and mates
- E are not allowed to touch the high tension switches until the latter have been made dead. Accordingly, one of the engineers threw out the oil switch and the set of switches controlling it, thus rendering part of the kiosk dead. The base of the oil switch was then removed and cleaned, and, in order to refix it, Paine got himself into the cubicle in a crouching and
- F sideways position so as to support the base and fasten the back bolt. Somehow his elbow got through the 6-in. space between the end of the screen and the back of the kiosk and touched the back busbar. It is highly probable that everyone thought that this busbar was dead. In fact it was not, and Paine was killed.
- G The kiosk had been made for the first defendants by the second defendants. It had been ordered under a quotation dated Aug. 23, 1929. A large-scale drawing showed the insulating screen as extending the full depth of the kiosk. The first defendants required the boxes to be made smaller, and revised sketches were submitted, and, by reason of the
- H position of the bracket in one of those sketches, it was left uncertain whether or not the screen was intended to be continued to the back. No explanation was given why it was not so continued, and it is clear that the first defendants thought it immaterial, and did not consider that the gap left any danger exposed. In the first kiosk delivered the busbar immediately adjacent to the gap would have been put out of

action when the top switches were thrown out, and, if that had been the case with the kiosk in question, the accident would never have happened. Again for some unexplained reason, the busbars in this kiosk were so arranged that the one which it was possible to touch through the gap was close to the gap instead of being over 6 ins. away from it as it should have been. This busbar, with the others, remained alive when the top switches were thrown out and carried the high tension current through to the next station, or would have done, had this not been the last kiosk in the area. A

The first defendants examined the first kiosk which was delivered to them. They saw that the screen did not fully enclose the oil-switch cubicle, but raised no objection. I do not think that they even troubled to consider the arrangement of the busbars. Whether they did or did not, they never examined any of the other kiosks, some 20 in number, which were delivered, and no question was ever raised, by any of the engineers who fitted them into place about the position of the busbars or about their position in this particular kiosk, though, if they had thought about it, they must have realised that, in this kiosk at any rate, a busbar, which would remain alive when the top switches were thrown out, was immediately adjacent to the gap, and a source of infinite danger to any man who had to squeeze himself into that 11-in. space. I am quite satisfied that, according to the practice usually adopted by the first defendants, it was necessary for the man who had to replace the base of the oil switch to get into the restricted space as best he could, and also it would never occur to him, who had nothing to do with inspecting or passing the layout of the kiosk, that there was a live busbar by this space. B
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Inasmuch as it is conceded that the plaintiff cannot rely upon any contract between the first and second defendants, and as, by reason of the Statute of Limitations, no claim for indemnity or breach of contract can arise between the defendants, I need not decide the question whether the presence of the space and the arrangement of the busbars in this particular kiosk amounted to a breach of contract. Neither of the defendants thought the gap of 6 ins. material, nor would it have been but for the arrangement of the busbars in this particular kiosk. I do not think that the first defendants troubled themselves about the arrangement of the busbars at all, and, even if the arrangement in the one which they looked at had been the same as in the one in question, they would have accepted it without question. Nor do I think that the second defendants attached any importance to it, possibly because they did not visualise that a man would have to get bodily into the oil cubicle in order to take down, or rather to replace, the base. If they had thought about it, they must have realised that this would have been inevitable if the oil switch needed attention, unless special tools were provided, and even then tools would have had to be fixed, or some part of the workman's body would have had to be, inside this cubicle. It should F
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perhaps be added, though it makes no difference, that it would in the case of this particular kiosk have been practicable to make the whole dead, because, as it was the last in the area, there was no other kiosk to which the high tension current had to be passed. It is, I think, probable that the reason why this was not done was that it was a matter of routine not to deaden the lower switches and busbars controlled by them, so no one thought of doing it in this instance.

In these circumstances, counsel for the first defendants admitted that, if the kiosk were an electrical station within the definition given in the Factory and Workshop Act, 1901, Sched. VI, he had no defence, owing to the lack of efficient screening. As an electrical station is defined in Sched. VI, para. (20) as

... any premises or that part of any premises in which electrical energy is generated or transformed for the purpose of supply by way of trade. . . .

- and as the transformer here was enclosed in a separate cubicle, he argued that only that cubicle was an electrical station, and that those in which the switches and the oil switch were housed were not. With all respect, that seems to me to be an impossible argument. I think that it is clear that the whole of the kiosk was an electrical station, and that the division into cubicles was only a method of screening or protection. The definition is dealing with places where current is either generated and then distributed, or delivered in bulk and transformed for distribution to a commercial voltage. It may be possible to have a transformer with no switches, but, if they are both under the same roof, as in this case, both must be protected. It follows, in my opinion, not only that there had been a breach of the Factory and Workshop Act, 1901, but also that the first defendants had failed to provide a safe place for their workmen, and had, therefore, committed a breach of their common law duty as recently laid down in *Wilsons & Clyde Coal Co., Ltd. v. English* (1). This is a duty which cannot be avoided by delegation. It is no answer to say, as counsel for the first defendants submitted: "We employed competent contractors to provide a safe place or plant." The class of cases in which the employment of a competent contractor affords a defence belongs to a wholly different category in the law of negligence. I have no hesitation in holding that the first defendants have no defence whatever to the plaintiff's claim.

- The main argument in the case, however, was on the question whether the plaintiff also has a claim against the second defendants. If she has, then, although the first defendants cannot claim an indemnity from them owing to the operation of the Statute of Limitations, they can ask the court to apportion the damages between them and the second defendants.

To show a cause of action against the second defendants, it must be established that they owed a duty to the deceased. There was no contract between them, so the duty, if there was one, must be sought elsewhere. Both counsel for the plaintiff and counsel for the first

defendants based their case against the second defendants on the ground that the kiosk was a thing dangerous in itself, arguing that anyone who was not warned of the danger and was injured by it had a remedy against the manufacturers. Since the decision of the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (2), the court is relieved, as I understand that case, from the task of considering whether the thing is dangerous in itself or only dangerous by reason of its negligent construction, or the use to which it is to be put. It is necessary to consider whether the circumstances are such as to create a proximate relationship between the manufacturer and the injured party. Duty may arise in many ways other than from contract. The commonest case is that of a driver of a vehicle on the highway. It is from his proximity to other users of the highway that his duty to take care arises. So, with dangerous things, there is a duty on those who send them forth, or instal them, towards those who must necessarily come into contact with them.

In *Dominion Natural Gas Co., Ltd. v. Collins & Perkins* (3), the gas company negligently installed a plant on a railway company's premises and put their gas into it so that an employee of the railway was killed. The gas company was held liable. So here, if the second defendants had been employed to supply and fix the kiosk, and turn on the current, I think that it may well be that they would be considered to be in a relationship sufficiently proximate to a workman who might have to enter the kiosk after the current was turned on to put them under a duty towards him. As I read the leading case, however, if A supplies a chattel to B in circumstances which show that there are opportunities for B to examine it, the supplier is not thereby brought into proximate relationship with B's employees or subsequent customers. I will cite two passages from the opinion of LORD ATKIN. He said, at p. 578:

The question is whether a manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

Again, at p. 599, he said:

... by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It seems clear that, in speaking of the prevention, or of the reasonable possibility, of examination, LORD ATKIN meant prevention or no possibility in a business sense. A person who buys 100 cases of tinned salmon from the packers has a physical opportunity of examining each tin. Commercially speaking, it would be impossible for him to do so, nor would anyone expect it, as by opening the tins he would spoil the contents before they could be sold. Perhaps, therefore, without disrespect, the word "probability" may be substituted for "possibility." If there be

such a probability, the relationship between manufacturer and ultimate user or consumer will not be proximate. Something is interposed which prevents the forging of a link between the two. Some day, perhaps, it may be held that, if a man negligently constructs or compounds something which he knows the employees or customers of his customer must use, he will not be allowed to rely on the fact that his customer ought to have examined the goods and did not do so. I do not think, however, that I have any right so to hold, and I must regard *M'Alister (or Donoghue) v. Stevenson* (2) as showing that, if there is a probability of examination, the proximate relationship of the manufacturer will not extend beyond his customer.

Here the second defendants were not employed to instal, but only to make and deliver, the kiosk. It had in fact been delivered some two years before the accident, and had been at the first defendants' premises ever since. The duty imposed by the Factory and Workshop Act, 1901, was on the first defendants, and it was for them to satisfy themselves that the kiosk complied with that Act. Their engineers fixed it, and, if no one troubled to see that it was safe for their men to use (and they knew better than anyone else could know the methods which would be adopted and the tools which would be used), they were, in my opinion, guilty of a very considerable breach of duty to their workmen. For these reasons I must hold that there was no proximate relationship between the second defendants and the deceased, and in so holding I am supported by the decision of ATKINSON, J., in *Otto v. Bolton & Norris* (4).

With regard to damages, as the value of the loss of expectation of life must be greater in this case than the plaintiff's interest under the Fatal Accidents Act, 1846, she does not ask for damages under that Act, but only as executrix for damages under the Law Reform (Miscellaneous Provisions) Act, 1934. I assess those damages at £1,250 in addition to the funeral expenses of £22 3s. 6d.

Judgment against the first defendants for £1,272 3s. 6d. with costs. Judgment for the second defendants: third party proceedings dismissed: the costs of the second defendants in the action and the third party proceedings to be paid by the first defendants. For the purposes of an appeal, damages apportioned as to two-thirds to the first defendants and as to one-third to the second defendants.

Solicitors: *T. & N. Blanco White*, agents for *Clifford G. Turner*, Watford (for the plaintiff); *James Turner & Son* (for the first defendants); *Carpenters* (for the second defendants).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

GILLETT *v.* KENT RIVERS CATCHMENT BOARD.JONES *v.* KENT RIVERS CATCHMENT BOARD.PAINE AND PAINE *v.* KENT RIVERS CATCHMENT BOARD.[KING'S BENCH DIVISION (Stable, J.), November 23, 24, 25, 28, 29, 30,
December 1, 1938.]

Land Drainage—Failure to keep drains in fit and proper condition—Non-feasance—Clearing weeds—Negligence—Breach of statutory duty—Land Drainage Act, 1930 (c. 44), ss. 12, 34.

The plaintiffs were owners and occupiers respectively of certain land in a district for which the defendants were the drainage board. Owing, it was alleged, to the defendants' failure to keep the sewers in a fit and proper condition, and mainly failure to clear a drain of weeds, the plaintiffs' lands were flooded and they suffered damage to their crops. Thereupon the present actions were brought, and the plaintiffs contended that the defendants' failure to keep the sewers in a proper condition amounted to negligence and constituted a breach of the defendants' statutory duty under the Land Drainage Act, 1930. It was proved in evidence that the defendants took all reasonable steps to clear the drain of weeds at the usual time of year :—

HELD: (i) on the facts of the present case, there was no such lack of care and skill as would amount to negligence.

(ii) under the Land Drainage Act, 1930, the defendants, in the circumstances, owed no duty to the plaintiffs breach of which would create a right of action in the plaintiffs.

[EDITORIAL NOTE.] In this case the judge comes to the same conclusion upon the law as that to which DU PARCQ, J., came in the *Cawdle Fen* case (1). The duties of drainage boards are, however, very diverse, and, for that reason, the consideration herein of the proper care and skill that must be shown in keeping a drain clear of weeds is of much importance to similar authorities throughout the country.

AS TO CATCHMENT BOARDS, see HALSBURY, *Hailsham Edn.*, Vol. 30, pp. 76-79, paras. 143-148; and FOR CASES, see DIGEST, Supp., *Sewers and Drains*, No. 399a, *et seq.*

Case referred to:

- (1) *Smith v. Cawdle Fen, Ely (Cambridge), Commissioners*, [1938] 4 All E.R. 64; Digest Supp.

ACTIONS against a catchment board for damages for breach of statutory duty under the Land Drainage Act, 1930, or, alternatively, for negligence. The facts are fully set out in the judgment.

F. Ashe Lincoln and *J. Tweedy* for the plaintiffs.

H. J. P. Hallett, K.C., and *H. H. Maddocks* for the defendants.

STABLE, J.: The facts that give rise to the present actions are, shortly stated, as follow. The three plaintiffs were, in the autumn of 1935, as to one of them the owner, and as to the remaining two the occupiers, of agricultural land situate in the Romney Marsh. Two of the pieces of land were actually adjacent to the Denge Marsh sewer, and the plaintiff Jones' land was some little distance away from the sewer. They say that at the end of Sept., 1935, and during the early days of

Oct., 1935, their lands were flooded with water, and crops of potatoes standing in the ground at the time were ruined. They seek to recover from the catchment board the damages that they consequently sustained. I am quite satisfied that each of the plaintiffs has sustained a very serious financial loss. Though the actual claim for special damage in each of the three actions was very considerably exaggerated, none the less I am quite satisfied by the evidence that in that autumn each of these three plaintiffs sustained a severe financial loss. The question is whether that loss can be recovered from this catchment board.

The Denge Marsh sewer, as it is called, which runs more or less from north to south, starting from a point immediately south of New Romney and running into the sea to the south and slightly to the east of Lydd, and at a point to the west of Dungeness Point, is the water-channel which drains a considerable area of the Romney Marsh, which lies on either side of the banks of the sewer. Every drop of water falling on that particular area which is not absorbed by the vegetation, is not consumed either by animals or by man, or does not percolate down to the water table or become absorbed or consumed in some way or another, must, if it is ultimately to get out to the sea, sooner or later pass down this Denge Marsh sewer. The system of drainage which prevails over the area consists of a number of smaller drains, called petty sewers, which are under the control of the drainage boards, and the private ditches, which intersect the land, which separate one field from another and which function both as fences and as drains.

A very dry July in 1935 was succeeded by a month in which there was a very considerable rainfall. In Aug., 1935, there was a rainfall of 5.41 ins., but of that amount about 3 ins. fell on three different days. There were three heavy storms—on Aug. 8, Aug. 12 and Aug. 30—but, apart from those heavy storms, August was a very dry month. Two storms in the first half of the month came after a very prolonged dry period, and I have no doubt whatever that the water that fell during those storms, as the witnesses described, was readily and greedily absorbed by the ground. When one comes to Sept. 15, this long and comparatively dry spell was succeeded by some twenty-odd days of almost continuous rain. From Sept. 15 to the end of the month, rain fell on every day with the exception of two. At the beginning of October, on each of the first nine days there was rain, and on most of those days there was very heavy rain. At the same time, the direction from which the wind was blowing was, generally speaking, from the south or southwest, and on Sept. 17, taking the Beaufort scale, the wind rose to a force of 9, later in the day, 8, and, later still, 7. On Sept. 19, the wind again attained a force of 7, 8 and 8. On Sept. 20, south-southwest wind is recorded at strengths of 6, 7 and 5. During this time, to add to the other difficulties that prevailed, the tides were very high. It is interesting to observe that on Sept. 17, which is the day when the wind was blowing at a force of 9, the tide was recorded as having attained

the very unusual height of 11 ft. On Sept. 16, exceptionally high tides were recorded, there being two records, one of 9 ft. and the other of 11 ft. In those circumstances, a severe strain was imposed on the Denge Marsh sewer in the performance of its function of draining this area, by reason of the conditions of wind, weather and tide.

Owing to the flat nature of the land, and to the low level at which it lies, the angle of descent of the sewer is very slight, and the outfall of the sewer is below the level of high tide. Thus, it follows that at no time will there be a very rapid flow of water from the sewer, and that, while the tide is over the height of the outfall, the discharge of water from the sewer must be suspended altogether. In those circumstances, it is not surprising that a good deal of Romney Marsh was at the end of September and the beginning of October, to use a neutral expression, extremely wet.

The plaintiffs, whose land was subjected to this wetness, say that the cause of this trouble was the negligence of this statutory body empowered to carry out the functions which are set out in the Land Drainage Act, 1930. In their statement of claim, they set out that it was the duty of the defendants to maintain this sewer, and they say that, in breach of statutory duty, the defendants did not clear the sewer of weeds, did not maintain the sewer in a fit and proper condition for its purpose, and did not raise and lower some sluice-boards at certain material times. Those, shortly stated, are the allegations of negligence. Complaint is made (i) of the weeds, (ii) of the way the sluice-boards were handled, and (iii) of the fact that, having received a warning of trouble ahead, the defendants did not take any action to avoid that trouble either by moving the sluice-boards or by clearing the weeds out of the way. To dispose of the question of the sluice-boards, I am not satisfied by the evidence that the sluice-boards have anything to do with the degree of wetness which prevailed over this area at the material time. There was no evidence, or certainly no evidence to satisfy me, that anything which the defendants or their servants did or omitted to do in connection with the sluice-boards had any bearing at all on the matter.

The substance of the complaint against the defendants resolved itself into the fact that, by reason of the fact that the main sewer was considerably blocked up by weeds, it did not discharge water at the rate which it could have done if the weeds had not been there. On the question of fact, I am satisfied by the evidence that the existence of the weeds in the main sewer was one of the direct causes of the occurrence of part of the inundations that took place over parts of this land. It was not the only cause by any means. I am quite satisfied that, in any event, if by some fortunate chance the sewer had been completely cleared of weeds immediately before this rainfall began, there would have been a very substantial degree of waterlogging on the lands in question. I am equally satisfied that that condition would have been considerably minimised if the sewer had been completely clear of weeds. If the defendants

are liable for damages simply because the weeds in the sewer contributed substantially to the loss incurred by at least some of the plaintiffs, on the facts I should have no alternative but to enter judgment for the appropriate plaintiffs, or all the plaintiffs. However, wholly apart from the law, I am not satisfied that the condition of this sewer at this time was the result of any lack of care or skill on the part of the defendants or the defendants' servants.

A I need not go through the evidence in detail, but it was proved conclusively that, with one exception, for years and years the date which the experience of people who had lived in this part of the world for generations prescribed for the cutting of the weeds in this sewer was some time between the middle of September, or towards the end of that month, and October. I was told that on one occasion the weeds were cut earlier, but that it had been a failure. Reasons were given why B September was chosen as the normal month for cutting the weeds. It is quite obvious that, having cut this mass of weeds, it was no good leaving them to float down the sewer, because that would have created a stoppage in the drainage system far worse than that caused by the presence of the growing weeds in the sewer. They had to be thrown out on to the banks, and that could not be done if the banks were occupied by standing crops. At least, I imagine that there would have been a good many actions if the weeds had been taken out of the sewer and thrown on top of a valuable standing crop. There was also the consideration of storing water. The drains and the sewer, and so on, had, of course, like most watercourses, at least a double function to perform. They were alike the channel by which surface-water was removed and the receptacle in which was held up and retained water that was required for the agricultural purposes of the district. In 1935, there was no sort of indication that any abnormal step ought to be taken in connection with the cutting of the weeds. Invitations for tenders were issued at the ordinary time, and in fact nobody came forward to contract for the work. Nevertheless, when this was known, the responsible officials took immediate steps to remedy the position, and the work of cutting weeds was proceeded with as fast as possible, taking into consideration the existing conditions of the land and the river where the weeds were to be cut.

G In my view, the plaintiffs have entirely failed to establish that the presence of the weeds in the river at the material time was the result of any lack of care or skill on the part of the defendant board, or any of its officers. That being so, in my judgment, it must be an end of the action, because nobody suggests that the standard of care imposed by H sect. 34 of the statute can be a higher standard than that of the exercise of due care and skill on the part of the responsible authority. If it had been necessary so to decide, I should have held that in law the Land Drainage Act, 1930, did not impose a duty on the catchment board at all. When I say that it does not impose a duty on the board at all, I

mean that it does not impose on the catchment board a duty in relation to farmers who live inside the area, so as to create a right of action at the suit of those farmers if the duty is not discharged. The Act empowers the drainage board :

. . . to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work. A

Sect. 12 sets up the machinery whereby the Minister, on complaint being made that the catchment board is not doing its work, can, after certain preliminaries have been observed, direct the catchment board as to what it is to do. I am not for a moment, of course, suggesting that, if, in the exercise of its powers, the board or their servants does something which infringes the common law rights of third persons, the mere fact that what they are doing is being done in the performance of a power created by the Act of Parliament affords a defence to an action for negligence at common law. I am not suggesting that for a moment. In my view, however, on the true construction of the Act of Parliament, if all that is complained of is that the drainage board have not maintained in a due state of efficiency one of the watercourses or drainage works in their area, that omission to exercise their power does not render them liable to be sued for damages in an action. I should have been prepared to have held that regardless of the fact that this action must fail, and fail at the very outset. That is the view I take of the Act, and that view is, in my judgment, confirmed by the decision of DU PARCQ, J., as he then was, in *Smith v. Cawdle Fen, Ely (Cambridge), Commissioners* (1). In my judgment, that case really decides this case, and that case is binding on me. I do not decide the case simply on the ground that that case is binding on me. It seems to me that the principle on which that case was decided is quite clearly right. In addition to that, the plaintiffs have not established to my satisfaction that it was the negligence of the defendants or their servants which was responsible for the damage. The result is that the three actions fail, and must be dismissed, with, I suppose, the usual consequences. B C D E F

Actions dismissed, with costs.

Solicitors : *A. Kramer & Co.* (for the plaintiffs) ; *Field, Roscoe & Co.*, agents for *Hallett, Creery & Co.*, Ashford (for the defendants). G

[Reported by F. HONIG, ESQ., Barrister-at-Law.]

CHAPPELL v. CHAPPELL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.), H
October 19, 1938.]

Divorce—Application to make decree absolute—By respondent—Respondent in contempt—Failure to obey order for alimony pendente lite made for benefit of children of marriage—Discretion of court—Matrimonial Causes Act, 1937 (c. 57), s. 9 (3).

Upon an application by a husband respondent that a decree nisi might be made absolute, it appeared that the husband had not complied

with an order for the payment of alimony *pendente lite* ordered to be for the benefit of the children of the marriage, and, further, had not paid the costs of the suit. In support of the application it was stated that the applicant wished to remarry before the expected birth of a child, of which he would be the father :—

A HELD : whether or not the applicant was in contempt in the sense that the court was debarred from exercising its discretion in his favour, this was not a proper case for the exercise of the discretion.

[EDITORIAL NOTE. The Matrimonial Causes Act, 1937, s. 9, gives a party against whom a decree *nisi* has been given a right to apply to have that decree made absolute after the expiration of 3 months from the earliest date on which the party obtaining the decree could have made such an application. The court, however, has a discretion whether it will accede to an application by a party who

B has not obeyed a previous order of the court, unless it is shown that obedience to the order is beyond the power of the applicant. The judgment herein seems to suggest that, had the failure to obey been the result of want of means only, it might have been a case for the exercise of its discretion even though the previous order was one for the payment of alimony ordered to be paid for the benefit of the children of the marriage.

C

AS TO MAKING ABSOLUTE A DECREE NISI, see HALSBURY, Hailsham Edn., Vol. 10, pp. 829, 830, para. 1326 ; and FOR CASES, see DIGEST, Vol. 27, pp. 550, 551, Nos. 6028-6031.]

Cases referred to :

- D (1) *Kemp-Welch v. Kemp-Welch & Crymes*, [1910] P. 233 ; 27 Digest 442, 4543 ; 79 L.J.P. 92 ; 102 L.T. 787.
- (2) *P. v. P. & T.* (1910), 26 T.L.R. 607 ; 27 Digest 443, 4560.
- (3) *Leavis v. Leavis*, [1921] P. 299 ; 27 Digest 542, 5915 ; 90 L.J.P. 302 ; 125 L.T. 28.
- (4) *Gower v. Gower*, [1938] P. 106 ; [1938] 2 All E.R. 283 ; Digest Supp. ; 107 L.J.P. 43 ; 159 L.T. 21.

E APPLICATION by the respondent husband, Ralph Robert Chappell, to make absolute a decree *nisi* of dissolution of marriage made in favour of Margaret Mary Chappell, his wife, the petitioner, on Oct. 14, 1937. The wife would have been entitled to apply for a decree absolute on or about Apr. 14, 1938. The petitioner did not apply to make the decree *nisi*

F absolute.

On Sept. 2, 1938, after 9 months had elapsed from the making of the decree *nisi*, the vacation court was moved on behalf of the respondent to make the decree absolute. Since the matter appeared to raise a question of principle, it was adjourned, to be dealt with by a judge of

G the Divorce Division.

The Matrimonial Causes Act, 1937, s. 9, provides as follows :

H Sect. 183 of the principal Act shall be amended by adding thereto a subsection as follows : “ (3) Where a decree *nisi* has been obtained, whether before or after the passing of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of 3 months from the earliest date on which that party could have made such an application, the party against whom the decree *nisi* has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit.”

Graham Brooks for the applicant, the respondent.

Roland Adams for the petitioner.

Brooks : Over 3 months having elapsed from the date when the petitioner could have applied for the decree to be made absolute, the respondent is entitled, by virtue of the provisions of the Matrimonial Causes Act, 1937, s. 9 (3), to apply for the decree *nisi* to be made absolute at his own instance. In the premises, a *prima facie* case under sect. 9 (3) for the granting of the application has been made out. The respondent wishes to be in a position to marry the woman named in the petition, with whom he is living, and of whom he expects a child to be born, of which he will be the father. A

Adams : The wife's attitude is entirely contingent on some sort of improvement on the husband's part towards the children of the marriage. He is in very grave contempt in the matter of alimony, the whole of which was ordered for the benefit of those children, and the husband further has not paid any of the costs of the suit. It is the established practice of the Divorce Court that anyone who has not obeyed the order of the court to pay costs shall not be allowed to take any further step in the suit. This principle has been extended to cover alimony as well as costs. Before the court can accede to the husband's application, it has to be satisfied that there is some impropriety on the part of the wife in not proceeding to have the decree made absolute, and that the wife is holding it up for some improper motive, such as the obtaining of some advantage which she ought not to have. It cannot be said that the wife is acting wrongly in taking the course which she has taken. In proper conditions, she would like her freedom, but not upon the basis that her husband, who has very definite obligations to existing children shall be able to go, and, by operation of law have another wife, and possibly other children. The preamble to the Matrimonial Causes Act, 1937, refers to the protection of children of the marriage. The talk of legitimising a child of the subsequent union is the purest sentimentality, and the ideas underlying it are contrary to justice. [Counsel referred to *Kemp-Welch v. Kemp-Welch & Crymes* (1), *P. v. P. & T.* (2), *Leavis v. Leavis* (3) and *Gower v. Gower* (4).] B C D E F

Brooks, in reply : The husband's non-compliance with the order of the court for payment is not wilful or wicked, but is due to his real inability to pay. The object of the 1937 Act, as expressed in the preamble, will be met, in the main, if the application is granted. One object is the removal of hardship, and it is certain that, if the present decree is not made absolute, hardship will fall upon the woman who is expecting a child. The husband has shown that he is intending to continue living with the woman named, and it is, therefore, also in the interests of public policy that his present marriage tie shall be dissolved. G H

HENN COLLINS, J. : This is a motion by the respondent in the suit, the husband, who, as a result of the suit, was found guilty of an adulterous association which began somewhere in Nov., 1936. His application is under the Matrimonial Causes Act, 1937, s. 9, to have the decree *nisi*

made absolute. I think that it is abundantly clear that any remedy open to a party under that section is not as of right, without regard to discretionary matters, but one in which the section clearly lodges in the court a discretion which it can exercise in the circumstances set out in the section.

- A As I see this case, there are two questions which I have to answer. First of all, the respondent husband, the applicant on the motion, being admittedly in contempt of court, is that contempt of such a nature as to debar him from the exercise of discretion? Assuming that the answer to that question is that he is not debarred, the next question
- B is whether or not the circumstances of the case are such that the discretion vested in the court should be exercised in his favour. I am satisfied on the facts of this case that this respondent has treated his legal obligations with contempt. He has preferred what he calls his moral obligations, although I can conceive of their being described by another
- C term, to those which he undertook when he married the petitioner. I suppose that the force of the case in his favour is the suggestion or the fact that the woman with whom he has been living is expecting to be delivered of a child some time in Mar., 1939. Accepting that for the moment—which is not verified by medical evidence—and assuming it to be
- D the case, that child must have been conceived somewhere about the middle of this year. If he found two establishments too expensive, why did he indulge, and add to his expenses? If, indeed, as is suggested, he is unable to meet the order of the court against him, he would have been much better advised to expend the money which it has cost him to
- E take these proceedings in reducing his legal liabilities. The true fact is, to my belief, that he does not want to honour his legal obligations, but prefers those which he describes as his moral obligations.

In those circumstances, I think that he is in contempt in the sense which, I will not say in all cases, or even in this, debars me from passing to the

F other considerations which might lead me to think that I ought to exercise discretion in his favour. However, I am quite clear that it is a case in which I ought not to exercise my discretion. The result is that he gets nothing by his motion, which will be dismissed with costs.

Motion dismissed with costs.

- G Solicitors: *Kimbers, Williams, Sweetland & Stinson* (for the applicant); *Ernest A. Kite* (for the petitioner).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS *v.* THE PERSONAL REPRESENTATIVES OF SIR HARRY MALLABY-DEELEY, BART.
THE PERSONAL REPRESENTATIVES OF SIR HARRY MALLABY-DEELEY, BART. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.)
December 8, 9, 1938.]

Income Tax—Disposition for more than 6 years—Payment to company in annual sums—Pre-existing obligation to pay a sum equal to total amount of annual sums—Capital or income payment—Finance Act, 1922 (c. 17), s. 20 (1) (b).

On Nov. 29, 1926, D. wrote to the directors of a company publishing a work called THE COMPLETE PEERAGE that, with reference to his offer to provide £33,000 to enable them to complete the work, he had already provided £5,000 by means of a guarantee, and he thereby recorded his undertaking to provide the remaining £28,000 by quarterly instalments of £1,400. This letter was under seal. In 1930, he entered into a fresh deed to pay the balance of the £28,000 then unpaid over a period of 7 years in annual amounts decreasing in value from £5,600 to £700, such sums to be the net amount after deduction of tax. The question was whether these payments were within the meaning of the words "any income" in the Finance Act, 1922, s. 20 (1) (b) :—

Held: the payments were of a capital nature, and could not, therefore, be deducted for the purpose of ascertaining D.'s income for the purpose of income tax or sur-tax.

Decision of LAWRENCE, J. ([1938] 3 All E.R. 463) reversed on this point.

[EDITORIAL NOTE.] The decision of the Court of Appeal that the payments here in question were capital payments rendered it unnecessary that they should consider two other points decided by LAWRENCE, J. These had reference to the questions whether the deed was entered into for valuable and sufficient consideration, upon which LAWRENCE, J., held that he was bound by a finding in the affirmative by the commissioners, and as to what part of the annual payments was within the Finance Act, 1922, s. 20 (1) (b), upon which he held that only the minimum sum of £700 was within that section. The Court of Appeal distinguish between the case of a man who desires a covenant to receive a certain sum of money, and effectuates that desire by entering into a covenant to make certain annual payments, and that of a man under a liability to pay a definite sum, which he covenants to pay by annual instalments. The latter case is the one arising here under the deed of 1930, which is construed as an arrangement to pay a capital sum by instalments. The doctrine that the court considers the substance, and not the form, of a transaction was the subject of observation in the *Duke of Westminster's* case (1) in the House of Lords, and certain limits were placed upon that doctrine. The Court of Appeal, however, state that their method of approach to the problem in this case does not fall within any discredited portion of that old doctrine but within its permissible limits, because it does not involve putting upon the transaction here in question a character which in law it did not possess.

AS TO DISPOSITIONS FOR MORE THAN 6 YEARS, see HALSBURY, Hailsham Edn., Vol. 17, p. 269, para. 538, and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a-576d, 674cc.]

Cases referred to :

(1) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; Digest Supp. : 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490.

(2) *Inland Revenue Comrs. v. Adam*, [1928] S.C. 738; Digest Supp.;* 14 Tax Cas. 34.

(3) *Ogden v. Medway Cinemas, Ltd.* (1934), 18 Tax Cas. 691; Digest Supp.

(4) *Inland Revenue Comrs. v. Ramsay* (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79.

A (5) *Chadwick v. Pearl Life Insurance Co.*, [1905] 2 K.B. 507; 28 Digest 66, 347; 74 L.J.K.B. 671; 93 L.T. 25.

(6) *Secretary of State in Council of India v. Scoble*, [1903] A.C. 299; 28 Digest 65, 337; 72 L.J.K.B. 617; 89 L.T. 1; *sub nom. Scoble v. Secretary of State for India*, 4 Tax Cas. 618.

(7) *Perrin v. Dickson*, [1930] 1 K.B. 107; Digest Supp.; 98 L.J.K.B. 683; 142 L.T. 29; 14 Tax Cas. 608.

B (8) *Dott v. Brown*, [1936] 1 All E.R. 543; Digest Supp.; 154 L.T. 484.

APPEAL AND CROSS-APPEAL from an order of LAWRENCE, J., dated June 30, 1938, and reported [1938] 3 All E.R. 463. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R. The decision of the court is only concerned with the cross-appeal of the Crown.

C *The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills* for the Inland Revenue Commissioners.

Cyril King, K.C., and *F. N. Bucher* for the personal representatives of Sir Harry Mallaby-Deeley, Bart.

D *King, K.C.*: If the appellant had had no income at all, he would have been liable to pay these sums. If the appellant had intended to reserve sums in the nature of a capital debt, all that it was necessary for him to do was to alter the undertaking of Nov. 29, 1926. Instead of providing that the debt should be wholly payable by Dec. 25, 1931, it could have been made payable by Mar. 31, 1936, which is the last of the dates of payment in the agreement of Mar. 30, 1930. The appellant has described these payments as income. Another case in which there was such an option was *Inland Revenue Comrs. v. Adam* (2), and the reasoning in that case was followed in *Ogden v. Medway Cinemas, Ltd.* (3). These cases support my proposition that the testator's intention is the indication as to the form of dealing with the particular sum. The matter is also summarised in *Inland Revenue Comrs. v. Ramsay* (4), and I rely particularly on the passage at the top of p. 98. There is nothing in the point that the difference may arise in the fluctuations of the annual payments. It cannot be said that the sum which ought to be paid is a payment of a capital sum of £28,000. There is a debt, voluntarily incurred no doubt, but still there is a debt. In *Chadwick v. Pearl Life Insurance Co.* (5), it was said by WALTON, J., that it was admitted that the annual instalments were not annual payments in the nature of income. The commissioners thought that the undertaking under the agreement of Nov. 29, 1926, had gone, and that the obligation of the agreement of Mar. 30, 1930, could not support my contention. If there is a binding contract between two parties that one shall pay the other so much for 7 years, that is good under this section to dispossess the covenantor of the amount he has covenanted to pay.

Bucher followed on the same side.

The Attorney-General (Sir Donald Somervell, K.C.) : By para. 4 of the case, it appears that Sir Harry Mallaby-Deeley, Bart., was minded, in the first instance, to provide a sum of £33,000. His next step was, by a deed, to constitute himself a debtor for £28,000, at the time unpaid, and to agree to pay that sum by 5 annual instalments. All that has happened since then has been a variation of the period at which, and of the amounts by which, the sum which he had undertaken to pay should be satisfied. The distinction between capital and income payments was laid down in *Secretary of State in Council of India v. Scoble* (6). That case is important, as it lays down the principle that, if one starts with a sum which, if paid, would not be taxable, and it is found, on analysing the matter that annual sums, calculated with reference to the lump sum, are to be paid, they are to be regarded as instalments of the capital sum. Even if there was an antecedent debt, it does not affect my argument. In *Secretary of State in Council of India v. Scoble* (6), the House of Lords, looking at the documents, and finding that the payments were calculated to satisfy a consideration, if the option had been exercised, of a total payment, said that the payments could not be treated as income. That case was followed in *Perrin v. Dickson* (7), in which it was held that the payments were not annuities liable to income tax, and that tax was chargeable on so much of the payments as represented interest. On the point that the second document was for the purpose of allowing a longer period, I rely upon these authorities as compelling the court to consider, not only the documents, but also the reason why they came into existence. In *Dott v. Brown* (8) payments went on until death. It was held that there was not an annuity, and the court regarded the matter as a mode of payment of a capital sum owed.

Hills : The strongest case is undoubtedly *Secretary of State in Council of India v. Scoble* (6), which shows that it is not a question of paying off an antecedent debt by instalments, but one of seeing whether a lump sum is being satisfied by payments made annually. On the true construction of the document, there was a promise to pay £33,000. The documents in question show how it was to be done. The payments would not be subject to income tax in the hands of the recipient.

King, K.C., in reply : It is open to question whether the agreement of November, 1936 was an agreement to discharge a sum of £28,000. In the earlier part of it, Sir Harry Mallaby-Deeley, Bart., is merely saying what he is minded to do in favour of the company. The operative part of the document is where he undertakes to make the annual payments. It is not a clear case of an antecedent debt to be paid by instalments within the meaning of the section. *Secretary of State in Council of India v. Scoble* (6) shows that it is only from the documents themselves that one can see what the true facts are. To find the exact legal relation between the parties in the present case, it is necessary to look at the instrument of March, 1930. It is on that instrument that an action would have had to be brought. The relation between the parties is that of

debtor and creditor. The legal relations between the parties show that these payments are annual payments of income. *Secretary of State in Council of India v. Scoble* (6) does not help the Crown case, because, on the document of March, 1930, there is no lump sum payable. In *Perrin v. Dickson* (7), there was a finding that a certain sum was arrived at in a certain way. In the present case, however, to take notice of a debt unsatisfied would be to set aside the form and give effect to the substance. That is not right, because there has been a deliberate change of form. That course was deliberately taken.

B SIR WILFRID GREENE, M.R. : The controversy in this case raised three points. Having regard to the view which we have taken upon the first point, it is not necessary for us to consider the other two points, and, therefore, it must not be taken that we are expressing any view as to the correctness or otherwise of the decision on those two points.

C The matter arises in this way. The late Sir Harry Mallaby-Deeley, Bart., was interested in the publication of a work known as *THE COMPLETE PEERAGE*, and on Nov. 29, 1926, he wrote to the directors of the company which was publishing that work a letter under seal. That letter was to the following effect :

D Gentlemen, With reference to my offer to provide a sum of £33,000 to enable you to complete the publication of the work known as *THE COMPLETE PEERAGE*, of which sum I have already provided £5,000 in the form of a guarantee for that amount to your bankers, and the balance I have undertaken to provide in five annual amounts of £5,600, I understand that upon the faith of this undertaking you are entering into contracts with various persons for delivery to them of complete sets of the said work ; and under these circumstances I am desirous of protecting you in the event of my death before the said payments have been completed. I write therefore to record my undertaking that I or my executors or administrators will make the aforesaid annual payments of £5,600 by quarterly payments of £1,400 the first quarterly payment to be made on Mar. 25, 1927.

Under that document, the late Sir Harry Mallaby-Deeley, Bart., made certain payments. The actual sum to be provided under it was £28,000, and, at the date of the document to which I shall now refer, there was a sum of £13,310 remaining unpaid. That is the total of the annual payments which still fell to be made. On Mar. 10, 1930, the late Sir Harry Mallaby-Deeley, Bart., executed a covenant under seal. It was a deed poll, and no consideration was expressed upon the face of it. It was to the following effect : Sir Harry covenants and agrees with the Genealogical Publishing Co., Ltd. [the publishers to whom I have referred] that he will make to the company out of his general fund of taxed income

the annual payments hereinafter specified after deducting income tax therefrom at the rate in force at the times of the making of such annual payments.

H Then the first payment to be made was :

In the year ending Mar. 31, 1930, such a sum as after deducting income tax therefrom at the rate then in force will leave the net sum of £5,600.

Then there followed six other provisions corresponding in their terms, save with regard to amount. The amounts of those six other provisions were

£3,000, £2,500, £2,000, £1,500, £1,500 and £700, those payments being made yearly on Mar. 31, in each year, the last payment of £700 falling due on Mar. 31, 1936.

The question that is raised is whether or not, for the purposes of calculating his total income for sur-tax purposes, those sums can be deducted. The relevant section of the Income Tax Acts is the Finance Act, 1922, s. 20. Before that section was enacted, it was permissible for a person, who had bound himself by covenant to pay an annual sum which in its nature was income, to deduct for the purposes of his return of total income the amount of the annual sum so covenanted to be paid. This section, however, prohibited that deduction in certain cases there specified, and the drafting machinery by which it was effected was by causing certain classes of income to be treated for the purposes of income tax (including super-tax), as the income of, in the case of a covenant, the covenantor. The relevant provision of that section reads as follows :

(1) Any income . . . (b) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after May 1, 1922 (other than a disposition made for valuable and sufficient consideration), is payable to or applicable for the benefit of any other person for a period which cannot exceed 6 years . . . shall, subject to the provisions of this section . . . be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person who is or was able to obtain the beneficial enjoyment thereof, or of the person, if living, by whom the disposition was made, as the case may be, and not to be for those purposes the income of any other person.

It is to be remembered that that section operates to exclude from the deductible payments of the covenantor anything which falls within its ambit, but the section, of course, has no operation, and does not need to have any operation, if the payments in any particular case are not of an income nature, because it is only payments of an income nature which ever could be deducted. The first question, therefore, which arises in this case is whether the payments which Sir Harry Mallaby-Deeley, Bart., covenanted to make under the deed of Mar. 10, 1930, are in their nature income. Before approaching that question, there are one or two more matters of fact which must be referred to. It is noticeable that the deed of Mar. 10, 1930, does not, upon its face, contain any references whatsoever to the previous obligations incurred by Sir Harry Mallaby-Deeley, Bart., under the letter under seal of Nov. 29, 1926, but, with regard to that, the stated case finds in para. 7 that the undertaking was handed over to the appellant by the company in exchange for the deed of covenant. There is one matter which I should have mentioned—namely, that the actual aggregate of the annual sums covenanted to be paid under the deed of covenant in fact exceeded the balance of £13,310 which remained unpaid under the letter under seal. However, the reason for that was that a sum of £3,490, which had been paid between Apr. 1, 1929, and Mar. 10, 1930, was treated as if it had been made under the deed of Mar. 10, 1930. That, of course, was not a correct apprehension of the position, and accordingly it is common ground, and was common ground, that that sum of £3,490 fell to be deducted from the covenanted

payments. In addition to the finding of fact as to the exchange of the documents, there is annexed to the case a letter of Apr. 1, 1930, from the solicitor to Sir Harry Mallaby-Deeley, Bart., to the company. It says :

Following upon our interview of yesterday I send you a copy of the new deed of covenant to be exchanged for the old one.

- A I need not read any more out of that letter, but, from the fact as found and from the terms of that letter, it appears to me that the only inference open to the special commissioners was that the deed of Mar. 10, 1930, was executed in consideration of a release by the company of the obligations of Sir Harry Mallaby-Deeley, Bart., under the letter of Nov. 29, 1926. There is another passage in the special case which the judge construed as amounting to a finding to that effect. I am not sure myself whether I so read it, but, whether or not it is to be read in the way that the judge read it, in my opinion, in so far as it may not amount to a finding that the consideration for the deed of Mar. 10, 1930, was a release of the antecedent obligation, it is a finding that cannot stand. The passage in question is as follows :

We have no doubt that, when the deed was entered into, it was understood that the company would not sue for the continuance of payments under the terms of the undertaking [the undertaking in the letter]. In the circumstances, and in the absence of any special urgency—of which no evidence was adduced—such forbearance would, we think, almost go without saying, and it has in fact gone unexpressed in the deed.

- D As I have said, reading that myself, I should have doubted whether that was intended to amount to a finding that the consideration for the execution of the deed was what I have stated. Whether it be right or whether it be wrong, the only permissible inference is that that was the true conclusion to be drawn.

E On that basis, the question must be considered. It was found by the commissioners that :

In our view the payments under the deed are income payments in virtue of the terms of the deed and are unaffected in their character by the undertaking [the letter], to which the deed makes no reference.

- F The judge agreed with that finding of the commissioners. It is based, as its language shows, upon the view that the deed of Mar. 10, 1930, was to be considered by itself, without reference to anything outside it. In my opinion, that is not a permissible way of approaching this question.
- G The distinction which is to be drawn for the purposes of the Income Tax Acts between payments of an income character and payments of a capital nature is sometimes a very fine and rather artificial one. It may—in fact, it does—depend upon the precise character of the transaction.
- H To take a simple case, if the true bargain is that a capital sum shall be paid, the fact that the method of the payment which is adopted in the document is that of payment by instalments will not have the effect of giving to those instalments the character of income. Their nature is finally determined by the circumstance that the obligation is to pay a capital sum, and instalments are merely a method of effecting that payment. On the other hand, to take another simple case, where there is no under-

taking to pay a capital sum and no capital obligation in existence, and all that exists is an undertaking to pay annual sums, those may, in the absence of other considerations, be annual payments of an income nature for the purposes of the Income Tax Acts. The operation of that distinction in individual cases may present some appearance of unreality. Nevertheless, it is a distinction which is now well founded, and the first A question that arises in this case is this: What circumstances may be regarded, for the purpose of the application of that rule? It is not disputed that a covenant to pay a lump sum by instalments is a covenant of a capital nature. It may be the purchase price of a business. It B may be a pre-existing debt, and that particular method of liquidating it may have been selected. However, it is said in the present case that, when you look at the deed of Mar. 10, 1930, you find, upon its face, nothing save a covenant to make annual payments. It contains no reference to a lump sum. It contains no reference to a pre-existing debt, and it must be taken at its own face value. That is the argument. It C means, in other words, what it says, and it is a covenant for payment of annual sums, and nothing else. On that argument, the fact that it was executed in pursuance of an arrangement under which the obligations of the original letter of Nov. 29, 1926, were released is irrelevant. I am unable to take that view. It appears to me that, for the D application of the principle, which I have stated in quite general language, it is not merely legitimate, but necessary, to examine what the true legal position was, and what the true legal transaction was of which the execution of the deed of Mar. 10, 1930, formed part. It is not legitimate to isolate that element in that legal transaction and to pay attention E to that alone. The matter, I think, becomes clear if it be assumed that the parties—that is to say, the company, on the one hand, and Sir Harry Mallaby-Deeley, Bart., on the other—instead of keeping all references to the pre-existing position off the face of the deed of Mar. 15, 1930, had written out at length on the face of that document what the true F legal position was and what the true legal results were that they were aiming at and carrying into effect. If this document had been in the form of a deed *inter partes*, in which there were recitals of the then existing obligations of Sir Harry Mallaby-Deeley, Bart., under the letter, the amount of the payments which had been made under that letter, G and the amount of the payments still falling to be made, and if then the company, in consideration of Sir Harry's covenants, released him from his obligations under the letter of Nov., 1926, it would have been impossible to say that only that part of the document must be regarded which contains the actual covenant by Sir Harry Mallaby-Deeley, Bart. It H seems to me quite impossible to say that, because the parties have not put their transaction into that shape, but have left the bargain, which is the true consideration for Sir Harry's covenant, to be inferred from their actions and the letter, the previously existing legal relationship and the true nature of the transaction ought to be ignored.

It was suggested by Mr. King, on behalf of the taxpayers, the executors of Sir Harry Mallaby-Deeley, Bart., that to treat the matter in that way would amount to bringing into operation the doctrine of substance as against form in a way which goes beyond the modern view of that doctrine, as expressed in the opinions in *Inland Revenue Comrs. v. Westminster (Duke)* (1). The doctrine has, in the past, been invoked for the purpose of treating a transaction of one legal character as though it were a transaction of a different legal character, and, in so far as that doctrine was enunciated, certain observations with regard to it are to be found in the opinions in the *Duke of Westminster's* case (1). However, the method of approach to this problem which appears to me to be the correct one does not fall within any discredited portion of that old doctrine, but falls within its permissible limits, because it does not involve putting upon a transaction between parties a character which in law it does not possess. It involves discovering what is the true character in law of the transaction which was entered into.

I therefore consider that, for the purpose of answering the present question, it is necessary to have regard to the pre-existing legal position and the true transaction which was effected by the deed of Mar. 10, 1930, and the exchange of that deed for the letter of November. That, of course, only raises the question. It does not decide it, because it is still necessary to examine the question of what was the nature of the obligation under which Sir Harry Mallaby-Deeley lay under the document of Nov. 29, 1926. If his obligation, on the true construction of that document, was an obligation to pay a lump sum by instalments, and, therefore, an obligation of a capital, and not of an income, nature, and if, by the later deed, that obligation was changed, so far as regards the outstanding payments, by a variation of the amounts and dates of payment of instalments, the only effect of the deed of Mar. 10, 1930, would have been to provide for payment, by different instalments at different times of different amounts, of an existing capital obligation, the payment of which, under the original document, was to be by other instalments in different amounts at different times. The matter, therefore, in my judgment, comes back to a question of the true meaning and effect of the document of Nov. 29, 1926. That document starts off by reciting an offer by Sir Harry Mallaby-Deeley, Bart., to provide a sum of £33,000. It is not suggested or found in the case that, by virtue of that offer, any legal obligation fell upon Sir Harry Mallaby-Deeley, Bart., and, before the execution of the letter of Nov. 29, we must take it that he was under no legal liability to make that payment. What he is dealing with there, however, is the provision of a capital sum of £33,000. The actual amount of that was reduced, as appears on the face of the letter, by £5,000 by virtue of a guarantee which he had given. Then he goes on to say:

The balance I have undertaken to provide in five annual amounts of £5,600. I read that recital as meaning: "I have offered to provide £33,000.

I have already provided £5,000 of it in the form of a guarantee, and the balance—namely, £28,000—I have undertaken (not in the sense that I have bound myself, but in the sense that I have promised) to provide in five annual amounts of £5,600.” Thus, he is dealing with that capital sum to be paid by instalments, and, if there had been a mere covenant to pay that capital sum by those instalments, I should find it quite impossible to hold that the instalments were income for the purposes of the Income Tax Acts. It would merely be a covenant to pay a capital sum by certain stated instalments. He then goes on to say that he understands that they have entered into various contracts. He states his desire to protect them in the event of his death before the payments have been completed, and then come the crucial words under which he undertakes the obligation which is to be binding upon him and his executors :

I write therefore to record my undertaking that I or my executors or administrators will make the aforesaid annual payments of £5,600 by quarterly payments of £1,400.

What does that mean ? “ The aforesaid annual payments ” are the five annual payments of £5,600, which is the method of paying the balance of the capital sum of £33,000. It seems to me, therefore, that, reading this document as a whole, upon its true construction, this is a covenant to pay the balance of £28,000 by annual payments of £5,600. In other words, it is a covenant to pay a capital sum by instalments, and is not a covenant to make annual payments in the nature of income.

It was suggested on behalf of the Crown that, provided there was present a mere intention to provide a sum expressed as a capital sum, and the covenant was a covenant to pay annual sums, that mere intention would be sufficient to bring the case within the rule to which I have referred. That is an argument which I must not be taken to be accepting for one moment. It seems to me that the cases to which we have been referred, and, indeed, the principle of the thing, must depend upon there being a real existing capital sum, not necessarily pre-existing but existing in the sense that it represents some kind of capital obligation. If you had a case where a man merely made up his mind that he would like a covenantee to have a certain sum of money more than he had got at present, and then effectuated that intention by entering into a covenant to make annual payments, the sum which he thought of, which in no real sense would be a sum at all, would be no more than the motive for entering into the covenant to make the annual payments. On the other hand, if there is a real liability to pay a capital sum, either pre-existing or then assumed, that capital sum has got a real existence, and, if the method adopted of paying it is a payment by instalments, the character of these instalments is settled by the nature of the capital sum to which they are related. If there is no pre-existing capital sum, but the covenant is to pay a capital sum by instalments, the same result will follow.

- Proceeding upon that basis, the position, at the date when the deed of Mar. 10, 1930, was executed, was that Sir Harry was under an obligation to pay a capital sum, or what was left of a capital sum, of £28,000 by certain annual instalments. That obligation he got rid of, substituting for it the obligation under the deed. It seems to me that, putting all
 A those circumstances together, what he was doing under the deed of Mar. 10, 1930, was liquidating a capital obligation of his own, an obligation which, it is true, was only to be carried out by instalment payments, but which, nevertheless, was of a capital nature, and he was liquidating that obligation by a series of instalments differing in
 B amounts and times from those which were referred to in the pre-existing document. On that basis, it seems to me that the case is one where it is not possible to say of the payments made under this document that they are of an income nature. They are given the character of capital. That character is stamped upon them by the circumstance that they are the
 C means of liquidating a capital obligation, and it is quite wrong to say that you must look at the documents alone, and disregard the other elements in the legal relationship between the parties and the legal results which that transaction achieved. If that view be right, there is an end of the case, because the other questions do not arise, and, as I
 D have said, about them I do not propose to add anything.

In the result, the Crown's appeal is allowed.

FINLAY, L.J. : I entirely agree, and do not desire to add anything.

LUXMOORE, L.J. : I also agree.

- E *Appeal allowed with costs. Cross-appeal dismissed with costs.*

Solicitors : *Solicitor of Inland Revenue* (for the inland revenue commissioners) ; *F. R. Allen* (for the personal representatives of Sir Harry Mallaby-Deeley, Bart.).

- F [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

BAILEY v. HOWARD

- G [COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.),
December 14, 1938.]

Negligence—Damages—Personal injuries—Loss of expectation of life—Child aged 3—Proper basis of compensation—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1.

- H A normally healthy child, aged 3 years, was killed in a motorcar accident due to the negligence of the defendant, and, in an action to recover damages, based upon the loss of expectation of life of the child, a jury awarded £1,000 :—

HELD : there is no quantitative scale for the guidance of judges and juries as to the assessment of damages in cases of this nature. The matter is essentially one for the jury, under a proper direction by the judge, and, as long as the figure is not altogether unreasonable, it cannot be altered on appeal.

[EDITORIAL NOTE.] The Court of Appeal has here rejected the suggestion that the measure of damages for loss of expectation of life is less when the plaintiff is suing on behalf of the estate of a deceased person than it is when a living person is the plaintiff. At the same time, the court inclines to the view that juries should be directed that such damages should be moderate in amount. The measure of such damages is not, at the moment, the subject of any sort of scale, and the proper figure is arrived at chiefly through the common sense of juries and their statement of their view of what they regard as reasonable under that head of damages in the English civilisation of to-day. A

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 724, 725, para. 1016; and FOR CASES, see DIGEST, Supp., Negligence, Nos. 835a-835c.]

Cases referred to: B

- (1) *Rose v. Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.
- (2) *Roach v. Yates*, [1938] 1 K.B. 256; [1937] 3 All E.R. 442; Digest Supp.; 107 L.J.K.B. 170.
- (3) *Trubyfield v. Great Western Ry. Co.*, [1937] 4 All E.R. 614; Digest Supp.; *sub nom. Turbyfield v. Great Western Ry. Co.*, 158 L.T. 135. C
- (4) *Feay v. Barnwell*, [1938] 1 All E.R. 31; Digest Supp.
- (5) *Shepherd v. Hunter*, [1938] 2 All E.R. 587; Digest Supp.
- (6) *Morgan v. Scoulding*, [1938] 1 K.B. 786; [1938] 1 All E.R. 28; Digest Supp.; 107 L.J.K.B. 299; 158 L.T. 230.

APPEAL by the defendant from the verdict and judgment at the trial before CHARLES, J., and a common jury, dated May 9, 1938, asking for judgment or a new trial. The facts are fully set out in the judgment of SCOTT, L.J. D

R. T. Monier-Williams for the appellant.

Eric O'Donnell for the respondent. E

Monier-Williams: It is not possible to award damages which are really sufficient in the case of a fatal accident. The principle of compensation has been entirely departed from in the cases which have arisen under the Act. There is in fact no one to compensate. The deceased's estate has suffered no loss. A much smaller sum than that found by the jury would be sufficient. A token amount would comply with the requirement of the statute, and would show that a right had been infringed. Compensation as such is impossible on the death of the person injured. The courts have found arbitrary sums which have no relation to the wrong suffered. It seems that there is a tendency to fix a definite sum as the value of the expectation of life. The £1,000 standard is illogical and wrong. It has no relation to the degree of loss as compared to the damages often awarded for a serious injury which does not result in death. The courts ought not to apply the ordinary canons of compensation, because they are not compensating any one. F

The Act says that the cause of action subsists in the case of death resulting, but says no more to indicate what the measure of damages should be. The sum of £1,000 was much too large. The jury really were trying to compensate the father for his pain and suffering at the loss of his daughter. [Counsel referred to *Roach v. Yates* (2), *Trubyfield v. Great* G

H

Western Ry. Co. (3), *Feay v. Barnwell* (4), *Shepherd v. Hunter* (5) and *Morgan v. Scoulding* (6).]

SCOTT, L.J. : This appeal raises a very interesting and difficult question with regard to the assessment of damages, in case of death, under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, which provides in these terms for the continuance of a cause of action where the old common law rule would, by reason of the death, have brought it to an end :

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

In the present case, the person who died was a child, Hazel Bailey, aged 3 years. She died by reason of an accident caused by the negligence of the defendant, who was a learner, to use an expression of the motoring world, at the time when he caused the accident. There was another child of the same parents, a little girl called Norma, a year younger than Hazel. She was injured, and damages were awarded in her case also.

I will first deal with the question of the damages for the death of Hazel. The judge tried the case with a jury, and summed up on the question of the loss suffered by the little girl Hazel in regard to expectation of life by reason of her life being suddenly ended one day after the accident as a result of the accident. His summing up was throughout an exhortation to the jury to be very moderate in the amount that they should give. He indicated to them that it was extremely difficult to form any idea of the principles upon which the amount should be arrived at. After consideration of the case, they returned a verdict of £1,000 in respect of that claim in favour of the personal representative of Hazel. The appellant here submits that that verdict ought to be set aside, on grounds which I, for one, find it very difficult to follow. The chief ground submitted by the appellant is, in his own language, that the measure of damages—that is to say, the quantum of damages which the cause of action possessed by the living person conferred on him when living—is reduced by the death, so that, when assigned by act of law to his personal representatives, the measure is smaller than it was when the right vested in the deceased man during his life. That is his formulation of the rule, and he submits that the Act must be interpreted as conferring upon the personal representatives of a deceased person killed in circumstances which would have given him a right to damages for the loss of expectation of life only a right to recover something substantially less than the deceased person might have recovered. In my view, there is no warrant for that submission as a principle of law in the Act or in any case which has been decided either in the House of Lords or in this court, or by any judge of first instance. In my view, it is wrong. The cause of action vested in the deceased person to which the words of the statute apply—a cause of right of action vested in a person who dies in circumstances which have vested that action in him—survives for the benefit of his estate. That cause

of action survives completely unaltered, according to the language of the statute, and I fail to see any reason why there should be implied in the statute words which Parliament did not insert. Therefore, in my view, that argument must be rejected. Apart from that argument, in the present case, there is no definite reason advanced for attacking the summing up of the judge, or the figure adopted by the jury who tried the case. A

I will now state the facts shortly, so far as the present motion for a new trial, on the ground that the damages were excessive, make it necessary to do so. There was evidence in the case that this small girl, Hazel, was a normally healthy child, and that the accident was the sole cause of her death. So far as she is concerned, there was no other evidence in the course of the trial. She lived for only one day after the accident. The judge quite shortly, as I said before, urged the jury to be moderate as to the amount that they gave. They considered that, in the circumstances of the case, £1,000 was a reasonable amount. C In my view, there is no ground for challenging that decision. In the peculiar circumstances of this cause of action created by the Act of 1934, I see no means of arriving at any sort of quantitative scale for the guidance of judges or juries except the gradual working out, chiefly through the common sense of juries, of the amount that in English civilisation of to-day are regarded as reasonable for that particular head of damages. D Whether any sort of scale will ultimately be worked out, or whether the assessment will remain permanently quite empirical, one cannot say. To-day, however, my own view is that the right attitude for the courts to take is that it is essentially a matter for the appreciation of the jury, under a direction of the judge, that the measure is the measure E of the right that the deceased person possessed, and that the amount to be given, and the way of assessment of that right, should always be strictly reasonable, and, if it should err at all, should err on the small side. F With these principles, the judge here, CHARLES, J., strictly complied time after time in the course of his summing up. Therefore, in regard to that cause of action, there is nothing further to say.

I would say one word about the cases which were cited to us. Counsel for the appellant called our attention to all the cases which have been decided in either the House of Lords, the Court of Appeal or the King's Bench Division in regard to the question concerning the expectation of life of the little girl who died from her injuries. In my opinion, the net result of those cases is that it is left to the appreciation of the jury to fix a figure, and, as long as it is a figure which cannot be said to be either hopelessly too large or hopelessly too small, it is a matter upon which it is right to trust the discretion of the jury, and to act upon it. It is on that principle, in my view, that this appeal should be dismissed with costs. H

MACKINNON, L.J. : I agree. As regards the £1,000 for loss of expectation of life, I really have no view as to whether I think it was too

much or too little, because I am perfectly incapable of forming any estimate as to what is the proper amount to be awarded in respect of the loss of expectation of life of a child of 3 years of age. That being so, the jury having fixed upon £1,000, I know of no reason why I should say that
 A that is an unreasonable amount which twelve reasonable people could not arrive at. That being so, I again see no reason why I should assent to the request that we should order a new trial. I think, therefore, that the appeal fails, and must be dismissed.

B DU PARCQ, L.J. : I agree. We were told by Mr. Monier Williams that this was a matter of some public importance, and I think that he said, or suggested, that some guidance was hoped for from this court. I think that no guidance can be given over and above that which has already been given in the opinions in the House of Lords in *Rose v. Ford* (1), and,
 C I think one may add, in the judgment of GREER, L.J., in that case in the Court of Appeal. If a judge reads what was said in that case (particularly what was said by LORD WRIGHT and LORD ROCHE, because they dealt with the question of the proper direction to the jury), then I think that he will have all the assistance which he can hope to derive from any
 D study of any judgments, and there it seems to me that the matter must be left, in the hope that juries will not be extravagant. If they never do anything more unreasonable than has been done in this case, then it seems to me that there will be no cause for complaint.

Appeal dismissed with costs.

E Solicitors : *Clifford-Turner & Co.* (for the appellant) ; *Rider, Heaton, Meredith & Mills* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

F
 HARRIS v. ASSOCIATED PORTLAND CEMENT
 MANUFACTURERS, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **October 31, November 1, December 15, 1938.**]

G
Workmen's Compensation—Workman drying leggings—Permitted Act—Act done rashly—Added peril—Whether act arising out of the employment—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

H
 A workman was employed in cleaning out washmills, for which purpose he tied rough sack leggings round his legs to protect him from dampness, as the work entailed standing in water. The leggings had to be dried at the end of each shift, for which purpose he was allowed to use the out-draught from a turbine in an adjoining motor-room. The turbine consisted of a motor with a revolving fan at one end. On taking his leggings to the motor-room to be dried, the workman found that the place where he wished to put them was occupied by the leggings of another workman, and he therefore put his own leggings in the inner casing behind part of the turbine, in close proximity to the revolving fan. While he was pushing the leggings in to counteract the outward force of the

draught, his hand was caught by the fan, and had to be amputated. The county court judge found that it was in the course of his employment to dry his leggings, but that, by his act of putting his hand inside the casing behind the iron brace of the turbine, he had added a peril to his employment through his extreme rashness, and he held, therefore, that the accident did not arise out of the employment. On appeal, the Court of Appeal held that it was a question of degree, and, therefore, of fact for the county court judge, and that there was evidence to support the finding of the county court judge, who had not misdirected himself either as to the law or as to the application of the law to the facts. Thereupon the workman brought this appeal:—

HELD (LORD RUSSELL OF KILLOWEN dissenting): as, on the facts found by the county court judge, the workman was doing something within the scope of his duty—namely, drying his leggings—he was entitled to recover compensation, and the fact that he acted in an extremely rash way did not prevent the accident from arising out of his employment.

Per LORD MACMILLAN: the question is not one of degree, but of kind, not of the degree of carelessness or rashness which the workman exhibits in doing his work, but whether he is doing his work at all.

Order of the Court of Appeal set aside.

[EDITORIAL NOTE.] It will be noted that the present case falls within sect. 1 (1) of the Act of 1925 and not within sect. 1 (2). Where a workman does a foolish thing, he is not barred by the foolishness of his action from recovering compensation so long as the act is within the sphere of his employment, though he is barred if the act is one outside that sphere. The question is not one of the degree of the foolishness or rashness of the act. It is one of the kind of act he is doing, that is, whether it is within the sphere of his employment.

AS TO ADDED PERILS, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 173, 174, paras. 363-365; and FOR CASES, see DIGEST, Vol. 34, pp. 284-293, Nos. 2389-2439. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 56-69.]

Cases referred to:

- (1) *Stephen v. Cooper*, [1929] A.C. 570; Digest Supp.; 98 L.J.P.C. 97; 141 L.T. 300; 22 B.W.C.C. 339.
- (2) *Blair & Co., Ltd. v. Chilton* (1915), 84 L.J.K.B. 1147; 34 Digest 308, 2541; 113 L.T. 514; 8 B.W.C.C. 324; *affg.* (1914), 111 L.T. 782.
- (3) *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 34 Digest 288, 2415; 83 L.J.K.B. 197; 109 L.T. 759; 7 B.W.C.C. 1.
- (4) *Lancashire & Yorkshire Ry. Co. v. Highley*, [1917] A.C. 352; 34 Digest 290, 2425; 86 L.J.K.B. 715; 116 L.T. 767; 10 B.W.C.C. 241; *revsq.* (1916), 85 L.J.K.B. 1513.
- (5) *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100; Digest Supp.; 102 L.J.K.B. 142; 148 L.T. 219; 25 B.W.C.C. 436.
- (6) *Barnes v. Nunnery Colliery Co., Ltd.*, [1912] A.C. 44; 34 Digest 299, 2489; 81 L.J.K.B. 213; 105 L.T. 961; 5 B.W.C.C. 195.
- (7) *Reed v. Great Western Ry. Co.*, [1909] A.C. 31; 34 Digest 294, 2449; 78 L.J.K.B. 31; 99 L.T. 781; 2 B.W.C.C. 109.
- (8) *Wilsons & Clyde Coal Co. v. M'Ferrin, Kerr v. Dunlop (James) & Co.*, [1926] A.C. 377; 34 Digest 301, 2499; 95 L.J.P.C. 130; 135 L.T. 164; 19 B.W.C.C. 1; *affg.* S.C. *sub nom.* *McFerrin v. Wilsons & Clyde Coal Co., Ltd.*, *M'Aulay v. Dunlop (James) & Co., Ltd.*, 18 B.W.C.C. 630, 680.

APPEAL from an order of the Court of Appeal (SIR WILFRID GREENE, M.R., ROMER and MACKINNON, L.JJ.), dated Nov. 11, 1937, affirming an award made in favour of the respondents by His Honour JUDGE

KONSTAM on July 13, 1937, at Dartford County Court, Kent, as arbitrator in a claim made by the appellant under the Workmen's Compensation Act, 1925. The facts and the arguments are fully set out in the opinions of their Lordships.

Gerald A. Thesiger for the appellant.

A *A. T. Denning, K.C.*, and *R. M. Wilson* for the respondents.

LORD ATKIN : My Lords, this is an appeal from a decision of the Court of Appeal affirming a decision of the county court judge at Dartford, who, in a claim under the Workmen's Compensation Act, made his award in favour of the employers. The material facts are simple. The workman being employed at times to stand in water, in accordance with a recognised practice of the workmen, used sacking to protect his trousers. In the course of his employment, he was entitled to dry the sacking at the end of each day. He was permitted by his employers to dry the sacking either at a stove or at the unfenced orifice of the revolving fan of a turbine in the motor-room. On the day in question, he chose to dry his sacking at the fan. Finding other sacking there, that a fellow-workman was drying, he placed his own sacking nearer the orifice, having to hold it there to resist the outward draught. He placed his sacking, held in his hand, too near the fan—in fact, within the casing of the fan. The sacking was caught by the fan, and the man's right hand was also caught, and was severed by the blades of the fan. The judge's view was that, though in drying the sacking the man was doing something in the course of his employment, yet, as he was acting with extreme rashness, he was not entitled to an award. After referring to a passage in the opinion of LORD HAILSHAM, L.C., in *Stephen v. Cooper* (1), he said that there was nothing in the contract of employment which obliged the applicant to put his hand within the base of the turbine.

In the Court of Appeal, SIR WILFRID GREENE, M.R., said that, while mere negligence did not take an act out of the scope of the workman's employment, there might be such rashness as to take it out of the category of mere negligence. The question was really one of fact and degree :

The act may be one of mere ordinary negligence or it may be so rash and foolish that no sensible workman would ever do it.

The judge had placed the act in the latter category. ROMER, L.J., said that the question was whether this was an act done by the workman negligently, but within the scope of his employment, or an act done in such a manner as to be something outside the scope of his employment. In each case, it was a question of degree, and, therefore, a question of fact to be determined by the county court judge.

My Lords, I regret to find myself in complete disagreement with the county court judge and the Court of Appeal on this matter. In my opinion, only one conclusion arose in law from the facts found by the county court judge, and that was that the injury to the workman was caused by accident arising out of and in the course of his employment.

I cannot assent to the doctrine that, though a man may be doing a piece of work within his employment, and may still be within his employment if he does it carelessly, yet, if he does the same piece of work very carelessly, he may be found to be doing something outside his employment. Once you have found the work which he is seeking to do to be within his employment, the question of negligence, great or small, is irrelevant, and no amount of negligence in doing an employment job can change the workman's action into a non-employment job. With great respect, it is not a question of degree, and does not give rise to a question of fact. The nature of the act is not altered in kind by the degree of negligence with which it was done. There is always, of course, the initial question whether or not the work the man was seeking to do was within the scope of his employment, and whether he was seeking to do it as part of his employment. This is the question of fact that arose in *Stephen v. Cooper* (1), where a farm-servant, driving a reaping machine drawn by two horses, had to refix a chain trace which had become loose. He chose to leave the machine in gear and to walk along the pole to reach the necessary spot. The horses started forward, and he fell, and was seriously injured. One can imagine an arbitrator finding that he was merely doing an employment job very carelessly. What he did find was ([1928] S.C., at p. 339):

. . . the appellant's act in balancing himself on and in walking along the sloping pole was not done "for the purposes of and in connection with his employer's trade or business," but was a foolhardy act of bravado. . . .

On this finding of fact, which had to be accepted as conclusive, the applicant necessarily failed. The case did not raise the question of the degree of negligence in doing an employment act turning the act into something outside the employment, and I find nothing in the opinions delivered in this House to support that view. The fact is that the workman's negligence in doing his job is one of the most fruitful causes of injury, and, if it would in any degree preclude compensation, the benefits of the Act would be seriously impaired. In truth, the negligence of the workman is as much a risk of his employment as is the negligence of his fellow-workmen. In my opinion, if a workman is doing an act which is within the scope of his employment in a way which is negligent in any degree, and is injured by a risk incurred only by that way of doing it, he is entitled to compensation. One must, of course, bear in mind the work which he is employed to do, and the place in which he is employed to do it. Some confusion has been introduced into the cases by treating accidents which arose in out-of-employment places as though they were cases of negligence, and still more by the unfortunate misapplication of the expression, valuable enough in its right context, of "added risk." In a sense, every man who does his appointed work negligently adds to the risks of his employment done carefully the risk of that employment done carelessly. In fact, the "added risk" might, I think, more correctly be called a "different risk"—that is, the risk in doing something which is not within his employment at all.

In the present case, I think that both the county court judge and the Court of Appeal have attached too much importance to *Stephen v. Cooper* (1), and to one sentence taken from the opinion of LORD HAILSHAM, L.C. I will cite once more the words of EARL LOREBURN in *Blair & Co., Ltd. v. Chilton* (2), assented to by all the members of the House. He said, at p. 1148 :

This is an appeal in a case under the Workmen's Compensation Act, 1906, which is an Act lending itself to infinite refinement. The words of the Act itself rule in every case. Previous decisions are illustrations of the way in which judges look at cases, and in that sense are useful and suggestive ; but I think that we ought to beware of allowing tests or guides which have been suggested by the court in one state of circumstances, or in one class of cases, to be applied to other surroundings, and thus by degrees to substitute themselves for the words of the Act itself.

If this warning had been regarded in the last 23 years, what a " wagon-load of cases " we should have been spared. In that case, a boy was employed to turn a wheel in a rolling machine. He had express orders not to sit at the work, as it was dangerous. He did sit, and was injured. The members of this House agreed with PICKFORD, L.J., who said, at p. 784 :

This, I think, is doing his work in a wrong way and not doing something outside his sphere.

I think that I ought to say a word about the sentence in the opinion of LORD HAILSHAM, L.C., which the county court judge followed and SIR WILFRID GREENE, M.R., cited in support of his judgment. In *Stephen v. Cooper* (1), LORD HAILSHAM, L.C., said, at pp. 573, 574 :

But it is well established by a series of decisions in your Lordships' House that, apart altogether from the question of serious misconduct, if the accident arises from some peril to which the workman has exposed himself by his own conduct and which he was not obliged to encounter by any terms of his contract of service, the accident cannot be said to arise out of his employment.

He quotes *Plumb v. Cobden Flour Mills Co., Ltd.* (3), where a man employed to stack bundles of sacks in a room which had no machinery chose to use a revolving shaft in the room, and was injured by the improvised machinery so set in motion. He was obviously not doing an act within his employment, and it was so held. He also cites *Lancashire & Yorkshire Ry. Co. v. Highley* (4), where it was held that a man crossing the lines between the trucks of a supposed stationary train was not entitled to compensation. It is plain that LORD HAILSHAM, L.C., was addressing himself to the facts of the case before him, and was merely purporting to restate the well-known test that a workman, to recover compensation, must be doing something he was employed to do. With great respect, however, I think that in this connection the word " obliged " is capable of being misunderstood, as I think it was misunderstood by the county court judge. The peril which a workman encounters in the course of doing his work by doing it negligently is not a peril which he is obliged to encounter. In fact, by his contract of service, he is obliged not to encounter it, for it is an implied term that he should work with reasonable care. There are many things done which the workman is not obliged to do, for he is given a complete discretion as to what to do and

where (within limits) to do it—as, for instance, in the case of gamekeepers, and often gardeners. Accidents happen to workmen when taking their meals, or in other respects not pursuing for the moment their employment. LORD HAILSHAM, L.C., is in any case only referring to perils which the workman is obliged to encounter. Even so, however, I think that the word may be misunderstood, and the test must be, whether the perils are those which he in fact encounters while doing the work which he is employed or authorised to do. In the present case, I am satisfied that the evidence leads to only one conclusion, that the appellant was injured by a peril of his employment while doing what he was employed or authorised to do, namely, drying his clothes. I think, therefore, that this appeal should be allowed, the order of the Court of Appeal and the award of the county court judge should be set aside, and the case remitted to the county court judge to award compensation. The appellant should have the costs in the county court and in the Court of Appeal, and the costs in this House appropriate to a successful appeal *in forma pauperis*.

LORD THANKERTON : My Lords, I agree with the opinion of my noble and learned friend LORD ATKIN. My noble and learned friend LORD WRIGHT, in the opinion which he is about to deliver, and which I have had the privilege of considering, has so fully and so exactly expressed my views in this case that I will only add a few observations. In my opinion, the county court judge in the present case is open to the criticisms expressed by LORD BUCKMASTER in *Thomas v. Ocean Coal Co., Ltd.* (5), at pp. 108, 109 :

The learned county court judge, whose award was upheld by the Court of Appeal, has rightly proceeded along the lines I have indicated, but it is his final investigation as to whether the accident arose out of and in the course of the employment that has caused me the gravest difficulty. He has not held as a matter of fact that the accident did not so arise, but he has reasoned himself to this conclusion in the belief that he was so constrained by the authority of *Stephen v. Cooper* (1). The workman there had, without putting the knives out of action, walked along the pole of a mowing machine in order to adjust the harness of one of the horses, which had become detached, and the horses, starting, had thrown him under the knives which had caused him serious injury. The arbitrator had found that the act was not done in connection with the respondent's business, but was an act of bravado, and that the injury was not due to an accident arising out of and in the course of his employment. The decision did no more than say that there was evidence on which the arbitrator could so find ; but the doctrine of an "added peril" was referred to by LORD HAILSHAM, L.C., where he says (p. 574) " . . . There was ample evidence to justify the arbitrator in finding that the principle of 'added peril' applies to the present case, and that consequently there was evidence on which he could properly find that the injury was not due to an accident arising out of the employment. . . ."

I agree with LORD HANWORTH, M.R., in thinking that such a phrase is not a touchstone whereby to determine whether or not the man was acting within his employment, and it would, I think, be unfortunate if this phrase got crystallised into a form of test, and an accident should be looked at according to the meaning of these words instead of relying, as reliance must be placed, upon the words of the Act of Parliament.

This passage is directly applicable to cases arising under sect. 1 (1) of the Act, and I agree with the observations of my noble and learned friend LORD BUCKMASTER on the so-called doctrine of "added peril" and the

use of the word "obliged" by LORD HAILSHAM, L.C., in the passage in his opinion in *Stephen v. Cooper* (1), which I am inclined to think has misled both the arbitrator and the Court of Appeal in the present case.

- A My Lords, I feel bound to come to the opinion that I have formed, on consideration of the words of the Act of Parliament, for the reasons expressed by my noble and learned friend, and also by the decisions of this House referred to by him, and in particular *Barnes v. Nunnery Colliery Co., Ltd.* (6), *Stephen v. Cooper* (1) and *Thomas v. Ocean Coal Co., Ltd.* (5). The courts below appear to me, with all respect, to proceed on a misunderstanding of the *dictum* of LORD HAILSHAM, L.C., in *Stephen v. Cooper* (1), and a misapplication of the so-called doctrine of "added peril." I cannot agree that the question is one of "fact and degree" of recklessness. In my opinion, there must be a separable act,
- B as explained by my noble and learned friend. In my opinion, there was not evidence in the present case on which the arbitrator was entitled to find that there was such a separable act, and the appeal should succeed.

- LORD RUSSELL OF KILLOWEN: My Lords, in my opinion, we ought not to alter the decision of the Court of Appeal which affirmed the arbitrator's award. As I view the case, it is, upon his findings, covered by the decisions of this House upon what has been called in this House "the principle of the added peril." All your Lordships, however, think otherwise, and, in these circumstances, my statement of the reasons for my opinion will be brief.

- E This is a case under sect. 1 (1) of the Act, and is in no way concerned with sect. 1 (2). *Thomas v. Ocean Coal Co., Ltd.* (5), which dealt with the question whether the added peril principle could apply to a case which fell under sect. 1 (2), appears to me to have no relevance here.
- F However, in a case falling under sect. 1 (1), we are, I think, concluded by authority, and we are bound to hold that, if the accident has been brought about by an act of the workman of a nature so perilous that no one could be employed to do such an act, then the workman cannot recover, because the accident cannot be said to have arisen out of and in the course of his employment. That, as I understand it, is the principle
- G of the added peril in cases falling under sect. 1 (1), as expounded in the most recent decision of this House, *Stephen v. Cooper* (1), and particularly in the opinions of LORD HAILSHAM, L.C., and LORD WARRINGTON. The workman is not deprived of relief because of negligence or misconduct, but because his act was of a nature so perilous as to be outside the scope
- H of his employment. Whether the act of the workman was of a nature to fulfil this requirement is essentially a question for the arbitrator, and, in the present case, as I read his judgment, he has found that the act of the workman in putting his leggings "inside the casing behind the iron brace of the turbine in close proximity to the revolving fan" fulfilled the requirement. He describes it as "a peril which no workman without acting with extreme rashness would have undertaken." The

act being of a nature so perilous, he held, upon the authority of *Stephen v. Cooper* (1), that the accident did not arise out of and in the course of the workman's employment.

The Court of Appeal held that the arbitrator was justified, on the facts, in so holding, and dismissed the appeal. It is suggested here that the grounds upon which the Court of Appeal proceeded were that, whereas a workman who is guilty of slight negligence is, nevertheless, entitled to recover, a workman who is guilty of great negligence, or gross negligence, is not. To suggest that is, I think, to do a grave injustice to the court. As I read the judgment of SIR WILFRID GREENE, M.R., what he has said is that an act within the scope of the employment may still remain within that scope though done negligently, but that there may be an act of a nature so perilous that no sensible workman would ever do it—in other words, that no workman could ever be employed to do it, and it is, therefore, an act outside the scope of the employment. ROMER, L.J., spoke, I think, to the same effect. It is true that at first sight he seems to contrast an act done negligently with the same act done in some different manner, but his meaning is, to me, plain. He intends to contrast two different acts—namely, an act which is within the scope of the workman's employment, though done negligently, and an act of so different a kind as to be (in his own words) "something outside the scope of his employment." Whether the undoubtedly perilous act of placing his leggings immediately under the revolving fan for the purpose of drying them was within or outside the scope of the workman's employment was a matter to be found by the arbitrator. If it was outside the scope of the employment, the award was right. The Court of Appeal refused to disturb the award, and, in my opinion, we ought to adopt the same course.

LORD MACMILLAN [read by LORD THANKERTON]: My Lords, throughout the whole course of the legislation dealing with workmen's compensation, from 1897 down to the present day, the cardinal condition of a valid claim of compensation has been that the accident causing personal injury to the workman shall have arisen out of and in the course of his employment. Amending legislation has affected this cardinal condition in a not very logical fashion by providing that, if the accident results in death or serious and permanent disablement, then, in certain cases, notwithstanding that certain facts are proved which might be thought to establish that the accident did not arise out of and in the course of the employment, the employer is to be precluded from so maintaining by reason of these facts alone. If the injury to the workman is proved to have been attributable to his serious and wilful misconduct, compensation is not to be disallowed by reason of this fact if the injury results in death or serious and permanent disablement. This is tantamount to saying that, although the accident is attributable to the workman's serious and wilful misconduct, it may nevertheless be held to arise

out of and in the course of his employment. In such a case, although the employer cannot, in answer to the claim, plead that the accident was due to the serious and wilful misconduct of the workman, he may still plead that, for other reasons, it did not arise out of and in the course of the employment. Further, but again only if the accident results in death or serious and permanent disablement, the employer is precluded from pleading that the accident did not arise out of and in the course of the employment because at the time of the accident the workman was (a) acting in contravention either of a statutory or other regulation applicable to his employment or of orders given by or on behalf of his employer, or (b) acting without instructions from his employer, provided in both cases that such act was done by the workman for the purposes of, and in connection with, his employer's trade or business. Subject to these qualifications and restrictions, the plea that the accident did not arise out of and in the course of the employment remains available to the employer.

The accident suffered by the workman in the present case has resulted in his serious and permanent disablement, but the case does not fall within any of the categories above described for which special statutory provision is made. The accident has not been held to be attributable to the serious and wilful misconduct of the workman, nor has the workman been found to have been doing something for the purposes of, and in connection with, his employer's trade or business, but in contravention either of some statutory or other regulation applicable to his employment or of his employer's orders or without his employer's instructions. In other words, the case arises on sect. 1 (1) of the Act alone.

It is well settled that a workman, during his working hours, and when he ought to be doing what he is employed to do, may choose to do something which has nothing to do with his employment, and, while so engaged, may sustain injury by accident. In such a case, the accident plainly does not arise out of and in the course of the employment. The workman has, for the time being, by his conduct put himself outside his employment. He is not working at his job. He is doing something else. It is in this light that *Stephen v. Cooper* (1) should be read and understood. The workman there, at the time of the accident, was engaged, not in doing his work, but in a "foolhardy act of bravado." However, if an accident befalls a workman while he is doing something that he is employed to do, he cannot be said to have quitted his employment merely by reason of the manner in which he has acted in doing what he was employed to do.

In the present case, as the arbitrator has found, the workman, in drying his leggings, was doing something which was in the course of his employment, for the operation of drying his leggings was incidental to his day's work. The way in which he was attempting to dry his leggings, however, has been characterised by the arbitrator as showing "extreme rashness," involving "a peril which no workman without acting with

extreme rashness would have undertaken." He did an "extremely foolish thing," which "there was nothing in the contract which obliged him" to do. It is on these findings that the arbitrator conceived himself to be in law precluded from awarding compensation.

In so holding, the arbitrator, in my opinion, misdirected himself. The word "obliged" which he borrowed from the opinion of LORD A HAILSHAM, L.C., in *Stephen v. Cooper* (1), at p. 574, is liable to be misunderstood. It does not in its context mean anything more than that the workman at the time of the accident must be engaged in doing something which is within the scope of his duty as an employee. The appellant in the present case was doing something which was within the scope of his duty—namely, drying his leggings—and the fact that he proceeded to do it in an extremely rash way does not prevent the accident which he sustained from arising out of his employment. The question is not one of degree, but of kind, not of the degree of carelessness or rashness which the workman exhibits in doing his work, but whether he is doing his work at all. However, I need not pursue the topic in any further detail, for I have had the advantage of reading in print the opinion of my noble and learned friend LORD WRIGHT, and I find myself in entire agreement with his views. In my opinion, the appeal should be allowed. C

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LORD WRIGHT: My Lords, in this appeal, which raises a question of importance under the Workmen's Compensation Act, I agree with the opinions just delivered by my noble and learned friends LORD ATKIN, LORD THANKERTON and LORD MACMILLAN.

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The facts found by the county court judge may be thus stated in meagre, but sufficient, outline. There arose out of and in the course of the man's employment that he had to dry his leggings at a turbine in a motor-room at the works. The turbine operated a revolving fan enclosed in an inner casing, which had holes in it at intervals to allow the draught produced by the fan to come out. There was an outer casing open at the bottom. The county court judge found that on the occasion in question another workman had put his leggings at the edge of the outer casing, which was the more convenient place. What the appellant then did was to put his leggings inside the outer casing. He was pushing the leggings inwards to counteract the draught when the revolving fan caught the clothes and pulled them inside the inner casing, pulling with them his hand, which was cut off, so that he was seriously and permanently disabled. The judge rejected his claim for compensation. F
He said that, though the man was obliged to dry these leggings, and was entitled to dry them somewhere within the benefit of the draught of the turbine, there was nothing in the contract which obliged him to put his hand within the base of the turbine. He found that the act was outside the employment. He added that this was a peril which no workman, without acting with extreme rashness, would have undertaken. It was "an extremely foolish thing." He held that the law G H

forbade him to award compensation. The Court of Appeal affirmed his judgment.

The case, in my opinion, raises in simple and direct form the question whether an act done in the course of the employment, and *prima facie* arising out of it, is removed from the scope of sect. 1 because it was done in an extremely negligent, reckless, rash or foolish way, so that it might be said that the workman, by his manner of doing what he had to do, had acted with extreme rashness. There was here only one act in question—namely, the drying of the leggings within the benefit of the draught of the turbine. The judge does not find that the man deliberately put his hand inside the inner casing and within reach of the fan. His hand got in by accident: “unfortunately his hand was caught.” The man’s evidence, as it appears in the judge’s note, is:

Put my hand in too far, draught caught sack legging, and, before I realised it, caught my right hand as well.

On the facts found by the judge, as I read them, this was a case in which an act arising out of and in the course of his employment was done so recklessly and rashly that the injury might properly be held to have been attributable to that recklessness or rashness. Such a finding, however, would, at the most, in my judgment, fall within sect. 1 (1) (b) of the Act, even if the rashness is to be put as high as serious and wilful misconduct. It was not said that the man was doing a prohibited act. Indeed, if that had been so, it would at once have brought the case within sect. 1 (1) of the Act of 1925, on which neither side relied. I do not find it possible to dissect the act done into two parts, one part within the employment and one part not within it, or to say that the man was acting within his employment till a point came when (I suppose) he pushed the leggings in too far and his hand got caught. In my opinion, if the accident is to be held to be outside sect. 1, it must be because it is found that what the man did was in its inherent nature of a different kind from anything that he was employed to do. However, what the judge finds is that the man was doing something which arose out of and in the course of his employment, though he was doing it “with extreme rashness.” The judge has not found—indeed, there was no evidence on which he could have found—that in fact the act done was outside the employment. He arrived at his conclusion as a matter of law. It is true that, when the facts are found, the question whether the case falls within sect. 1 (1) of the Act is a matter of law, but here, in my opinion, on the facts found by the judge, it followed as a matter of law, on the true construction of sect. 1 (1) of the Act, that the man was entitled to recover.

The conclusion which the judge arrived at seems to have been due to a failure to appreciate the effect of *Stephen v. Cooper* (1), on which he expressly based his judgment. In that case, the act which caused the injury was held by the arbitrator to be outside the man’s employment, because of the view he formed of its character. According to his finding,

it was not merely rash or reckless, as indeed it was. It was an act of a kind different from any act that the man was employed to do. He was a farm-labourer, working a mechanical cutter and reaper. Attached to the machine was a long pole, on each side of which were the two horses which drew the machine, which were harnessed to it in the usual way. The traces of one horse became detached. The man, instead of jumping off and running to the horse's head, ran along the slanting pole, and fell off as the horses started forward. He was seriously injured by the revolving cutters. LORD HAILSHAM, L.C., described this action as an act of bravado. Indeed, it was rather the act of an acrobat than that of a farm-labourer. There was no need to dissect it into two parts and say that one part was within, and one part outside, the employment. It was a single act, and the arbitrator was entitled to find that, as such, it was outside the employment. It was in respect of this finding of facts, which, though another view might have been taken, was final, that LORD HAILSHAM, L.C., used the language quoted in the Court of Appeal in the present case (pp. 573, 574):

... apart altogether from the question of serious misconduct, if the accident arises from some peril to which the workman has exposed himself by his own conduct and which he was not obliged to encounter by any term of his contract of service, the accident cannot be said to arise out of his employment.

These words were apt and appropriate to the facts of the case as found by the arbitrator, but cannot properly be applied apart from their context, or used as a general statement of law of the same binding force as if written into the statute. I am reluctant to repeat the warning, so often reiterated in this House, against the danger of superseding the words of the legislature by language used by judges in particular cases, and with reference to the facts of the particular cases, in order to explain how they arrived at the particular decisions. Nevertheless, I must at least give a reference to the words of LORD DUNEDIN in *Plumb v. Cobden Flour Mills Co., Ltd.* (3), later quoted by LORD BUCKMASTER in *Thomas v. Ocean Coal Co., Ltd.* (5), at p. 109. In particular, LORD DUNEDIN there pointed out that most of the erroneous arguments put before the courts in this branch of the law will be found to depend on disregarding the salutary rule that a test convenient in a particular case must not be allowed to dislodge the original words of the Act. I venture to add that the tendency to disregard the words of the Act and substitute extracts from judgments is largely responsible for the accretion of thousands of cases round a legislative measure which was intended to be administered, rather than litigated upon. In *Stephen's case* (1), the man was not obliged by his contract of service to assume the role of an acrobat, and, in doing so, he exposed himself to a peril arising from his own conduct. Hence the aptness in that case of the language of LORD HAILSHAM, L.C. LORD WARRINGTON OF CLYFFE states the position thus, at p. 582:

In my opinion it was quite open to the arbitrator on the evidence to find that what the appellant did was not merely an improper way of doing what he was

employed to do—namely, replacing the chain—but was the doing of a thing—namely, the walking along the pole—which, whatever the object with which it was done, was a thing he was not employed to do and was not in the contemplation of either party to the contract.

- The distinction so drawn is, I think, vital in principle to the decision whether a case does or does not come within sect. 1 of the Act. LORD WARRINGTON OF CLYFFE does not use the word “obliged,” nor is that word used in sect. 1 of the Act. The term may be helpful in some cases when the court is inquiring whether the thing done is different in kind from anything the man is employed to do, but it is not appropriate when the question has to do with acts which involve serious or wilful misconduct, or even negligence, but are otherwise such as the man has to do. It can only be appropriate when considering what is the intrinsic character of the acts, so as to determine if they fall outside the employment. If a man does what he is employed to do, he may perhaps be said to do what he is “obliged” by his employment to do, and, if that is true in any such case, it does not become less true merely because he does it in a manner which is negligent or improper, even to the extent of serious and wilful misconduct. No one would say that a man’s employment obliged him to be guilty of serious and wilful misconduct, though the action as a whole was one which fell within his employment, and, as such, fell within sect. 1 (1).

- “Obligation” on any view refers to the character of the act, and not to the manner of doing it. However, I should hesitate to treat the word as affording in any case real or general guidance. LORD SHAW, in *Stephen’s* case (1), seems to indicate his opinion that, in certain events, a zealous or well-meaning workman may exceed his strict duty without losing the protection of the Act. That may well be true. Emergencies also may raise questions. The word “obliged” finds no place in the Act, and the courts have no right to insert it.

- The distinction to which I have been adverting is clearly drawn by this House in *Barnes v. Nunnery Colliery Co., Ltd.* (6). LORD ATKINSON says, at p. 49:

In these cases under the Workmen’s Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment.

- In the same case, EARL LOREBURN, L.C., said, at p. 47:

But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment.

- The problem may be compendiously stated in the words of LORD MACNAGHTEN in *Reed v. Great Western Ry. Co.* (7) as being whether the man, at the time when the accident happened, was about his own business, and not about the business of his employers. Again, in cases where there was an act of disobedience to regulations or orders, the question has been said to be whether the disobedience took the action outside the scope of

the employment or was only a piece of misconduct in the employment. *Plumb v. Cobden Flour Mills Co., Ltd.* (3) and *Lancashire & Yorkshire Ry. Co. v. Highley* (4) were cases in which the former view was taken and it was held that the accident did not arise out of the employment. In these and other cases, the phrase "added peril" has been used, but, as VISCOUNT HALDANE pointed out, what that phrase means is a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required, nor had authority, to submit himself: *Highley's* case (4), p. 361. LORD DUNEDIN in the same case said, at p. 365:

... the question is always whether the case falls within the words of the Act, and that added peril is a test only, though a very convenient test in certain circumstances.

In *Thomas v. Ocean Coal Co., Ltd.* (5), LORD BUCKMASTER expressed himself to the same effect, at p. 109. Indeed, that an "added peril" may not take a case out of the Act is clear from the words of sect. 1 (1) (b), which enables compensation to be given if the injury results in death or serious and permanent disablement where the injury is attributable to serious and wilful misconduct. To say that the injury is attributable to serious and wilful misconduct means that it would not have occurred but for serious and wilful misconduct, so that the misconduct must have involved "an added peril." It seems to me that this phrase, which does not embody a principle, is very apt to mislead and distract the mind from the true question. That the question still remains the same since the amendment of the law now embodied in sect. 1 (2) of the Act is clear from *Kerr v. James Dunlop & Co.* (8), where the claim was rejected because the man had left the sphere of his own employment and entered the sphere of another man, skilled, responsible and specially authorised, with which, as an unskilled man, he had no right to meddle. By way of contrast, reference may be made to *Wilsons & Clyde Coal Co. v. M'Ferrin* (8), and *Thomas v. Ocean Coal Co., Ltd.* (5).

While the judge decided the case as a matter of law on the facts which he found, the Court of Appeal seem to treat the question as a question of fact and degree whether the act was one of mere ordinary negligence or was so rash and foolish that no sensible workman would ever do it. ROMER, L.J., treated the judge's decision as being that it was not within the scope of the man's employment to dry his clothes in the way he did. With the greatest respect to the opinions of the Court of Appeal, I think that these expressions tend to obscure the real distinction between the manner of doing an act which in its nature is within the employment and the doing of an act which in its nature is different in kind from any contemplated by the employment. It is not easy to reconcile all the expressions which have been used in judgments on the question of whether the application of sect. 1 (1) of the Act depends on fact or law. In one sense, it is both fact and law. The facts have to be found and the words of the Act then applied to the facts according to their true construction, which is a matter of law. For reasons already stated, I do not think that,

on the true construction of the section, an act which in its nature is within the section ceases to be so because it is recklessly or improperly performed, or that mere degree of negligence or impropriety, such as is found in this case, changes the intrinsic character of the act and makes it different in kind. In my opinion, the appeal should be allowed.

A *Appeal allowed with costs.*

Solicitors: *H. Flint & Co.*, agents for *Thomas Church*, Gravesend (for the appellant); *Leonard & Pilditch* (for the respondents).

Dicta of CLAUSON AND GODDARD, L.J.J., at pp. 848, 849, applied.
NORTON v. WHITE. [1949] 1 All E.R. 925. *quoted by MICHAEL MARCUS, Esq., Barrister-at-Law.*

R. & P. PROPERTIES, LTD. v. BALDWIN.

[COURT OF APPEAL (Slessor, Clauson and Goddard, L.J.J.), **December 16, 1938.**]

C *Landlord and Tenant—Rent restriction—Controlled dwelling-house—Two controlled houses combined into one in 1935—Whether combined dwelling-house thus created is controlled—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), ss. 1 (2), 16—Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (c. 26), s. 2.*

D The plaintiff was the owner of a block of flats. In 1935, he combined two adjacent flats into one by making a doorway in the dividing wall. The outside doorway of one flat was bricked up and the kitchen range was replaced by a fireplace. The combined flats were then let to the defendant, who had previously been the tenant of one of them. Before the reconstruction, each half had been a controlled dwelling-house under the Rent Restriction Acts, and the defendant contended that the alterations did not change the identity of each half so as to prevent them from being separate dwellings, and, therefore, still controlled.

E **HELD:** there had been a new occupation of new premises, which did not exist as premises before 1935. As the 1933 Act only applied to a dwelling-house to which the Acts applied before it was passed, it could not apply to this new dwelling-house. For a similar reason, the 1938 Act did not apply, and the new dwelling-house was not controlled.

F **[EDITORIAL NOTE.]** This case is important in two respects. In the first place, it decides that alterations of the kind here made constitute the combination of the two flats a new dwelling-house. This is primarily a question of fact, but the decision of the Court of Appeal herein will be of considerable assistance in considering this problem. The construction of the Acts is, of course, a matter of law. The importance of the present decision is the stress laid on the point that neither the 1933 Act, nor the 1938 Act can apply to a dwelling-house that was not a dwelling-house to which the Acts applied immediately before the passing of the 1933 Act.

G **AS TO EFFECT OF THE 1933 ACT,** see HALSBURY, Hailsham Edn., Vol. 20, pp. 317-319, paras. 375-378; and **FOR CASES,** see DIGEST, Supp., Landlord and Tenant, Nos. 7359f - 7361b.]

H Cases referred to:

- (1) *Phillips v. Barnett*, [1922] 1 K.B. 222; 31 Digest 566, 7132; 91 L.J.K.B. 198; 126 L.T. 173.
- (2) *Brooks v. Brimcome*, [1937] 2 K.B. 675; [1937] 2 All E.R. 637; Digest Supp.; 157 L.T. 417.
- (3) *Marchbank v. Campbell*, [1923] 1 K.B. 245; 31 Digest 571, 7192; 92 L.J.K.B. 137; 128 L.T. 283.

- (4) *Sinclair v. Powell*, [1922] 1 K.B. 393; 31 Digest 565, 7129; 91 L.J.K.B. 220; 126 L.T. 210.
- (5) *Middlesex County Council v. Hall*, [1929] 2 K.B. 110; Digest Supp.; 98 L.J.K.B. 482; 141 L.T. 243.

APPEAL from a decision of His Honour JUDGE TUDOR REES given at the Shoreditch County Court and dated Oct. 5, 1938. The facts of the case are fully set out in the judgments.

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H. Heathcote-Williams for the appellant.

I. H. Jacob for the respondent.

Williams: Since the 1938 Act, no dwelling-house can be controlled unless it was controlled before 1938, or formed part of a controlled house. As this dwelling was not in existence in 1933, it could not be brought within the Rent Acts by the 1933 Act. [Counsel referred to *Brooks v. Brimcome* (2) He was stopped by the court.]

B

Jacob: Even if there was a new letting, this case was brought within the 1938 Act by sect. 2 (1), because this was a dwelling which, immediately before the passing of that Act, was controlled. There was in fact no new letting in 1935, so as to take the case out of the Acts. There was no change made in the character of the dwelling. The landlord could either have registered or have carried out substantial structural alterations. He did nothing. The question of whether there has been a change of identity is one of fact. A dwelling-house that is within the Acts continues to exist unless such alterations have been made in its character that it ceases to exist. The identities of these two flats were not changed by the mere fact of letting them together. [Counsel referred to *Phillips v. Barnett* (1), *Marchbank v. Campbell* (3), *Sinclair v. Powell* (4) and *Middlesex County Council v. Hall* (5).]

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Williams was not called on to reply.

SLESSER, L.J.: The facts of the case, so far as they are here material, are these. Mr. Ernest Baldwin, the defendant in this case, was, at the time when the action was brought, the tenant of certain premises previously known as 69 and 70, Quinn Buildings. Quinn Buildings appear to be buildings composed of a number of flats, of which these two, which comprise the dwelling here in question, were a part. There is some question whether or not these two flats, Nos. 69 and 70, are to be regarded as separate dwelling-houses. The judge came to the conclusion that notwithstanding the alterations made, Nos. 69 and 70, which admittedly before 1935 were separate flats, their rateable value in both cases being such as to bring them separately within the ambit of the Rent Restriction Acts, continued to be separate dwelling-houses. The judge has found that the alterations were of a minor character, and that they did not so change the identity of either No. 69 or No. 70 as to prevent them from being separate dwelling-houses as contemplated by the Rent Acts. The evidence is that in June, 1935, when the alterations were made:

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a hole was made in the wall between Nos. 69 and 70, and a doorway made, and that both now are known as No. 70. The outside doorway of No. 69 was bricked up.

the kitchen range in No. 69 sitting-room fixed in brickwork was taken away, and another fireplace substituted. The tenant of No. 70 vacated that flat and the tenant of No. 69, Mr. Baldwin, took over No. 70. The rent of both flats previously was 6s. 3d. a week. The now combined flat rent was agreed at 15s., and lately increased to 17s. Before reconstruction the flats were controlled.

- To my mind, it is impossible, on that evidence, after the new flat rent had been agreed at 15s., following upon the assimilation of No. 69 and No. 70 into one occupied premises, to come to the conclusion, as the judge did, that the identity of No. 69 or No. 70 continued as a separate identity. To my mind, it is clear that there was, after June, 1935, a new occupation of new premises, which did not exist as premises before that time.
- There was thereafter only one doorway, giving access to both the premises. The space in the wall was now capable of utilisation as a passage to and fro, a state of affairs which did not exist before. There were those and other physical alterations. The obligation of rent was an obligation agreed on to pay 15s., extending, as Mr. Stewart said, over the new combined flat.

- I think that the judge was wrong, on those facts, in coming to the conclusion that, as a matter of law, from the point of view of the Rent Restriction Act, one could still look at No. 69 or No. 70 as separate dwelling-houses, admittedly controlled under the Act before 1935. If that be the right view, then it is not seriously contended that these new premises can be taken as being within the Rent Restriction Acts.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, which came into operation on May 26, 1938, it is provided by sect. 2 (1) as follows :

- ... the principal Acts ... shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act. ...

It must also be a dwelling-house of which the rateable value did not exceed :

- (a) in the metropolitan police district or the city of London, £35.
- That latter qualification was satisfied in the premises here, as the rateable value of the new combined premises did not exceed £10.

- That raises the question whether or not this new dwelling-house was a dwelling-house immediately before the passing of the 1938 Act. The Act which most recently affected the status of a dwelling-house before the passing of the 1938 Act was the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which by sect. 1 (2) provided as follows :

As from Sept. 29, 1933, the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act. ...

One then turns to sect. 16 of that Act, which defines a dwelling-house as follows :

"Dwelling-house" has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling. ...

If the right view be, as I have said, that this combined flat was let as a separate dwelling, it is clear that it could not have been let as a separate

dwelling before June, 1935, because before that date it did not exist, and, therefore, was not a dwelling-house within the meaning of sect. 1 (2) of the Act of 1933, and, therefore, was not a dwelling-house under sect. 2 of the Act of 1938, because, at the time of the passing of that Act, it could not be said that it was a dwelling-house to which the principal Acts applied immediately before the passing of the 1938 Act. That, to my mind, concludes the problem which we have here to consider. Numerous cases have been cited, many of them at the invitation of the court, but, as I understand the statutes, once it is decided, as I think it ought to be decided, that these premises did become a separate dwelling-house in 1935, the statutes are clear as to the result, and no authority affects the matter. Therefore, I am of opinion that this appeal succeeds.

CLAUSON, L.J. : I agree. Not only in deference to the county court judge, from whom we are differing, but also as a humble recognition on my own part of the great assistance I have had from the very frank argument of counsel on each side, I will venture to put my conclusions as shortly as I can, in my own words.

The facts of the case are these. Flat No. 69 was occupied by one tenant, and the adjoining flat, No. 70, was occupied by another tenant. Each tenement was a house let as a separate dwelling, of such a character that, before the passing of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, each of the tenements were houses to which the Rent Restriction Acts applied. That was the position of these two houses in 1935. In that year, the tenant of No. 70 left, and the tenant of No. 69 was desirous of having more accommodation. The landlord made the alterations of a quite minor character which were necessary to enable No. 69 and No. 70 together to be occupied as one flat. Those alterations had, however, the very important effect of turning what had previously been two tenements separately occupied into one tenement capable of a single occupation. The landlord, having made the alterations, then proceeded to let the new combined flat to the person who, up to that time, had been the tenant of No. 69 only.

What in law is the effect of that ? As I understand his judgment, the judge has held that the two halves of the new tenement, which, as separate tenements, were subject to the Act, while occupied as separate dwellings, continue, now that there is a new subject-matter of demise—namely, the totality of the two—to be subject to the Act. The county court judge infers from that that, the two parts being subject to the Act, the whole is subject to the Act. As I understand it, that is the way the matter is put. I can find no justification in the Acts for any such conclusion. The position seems to me, when one studies the intricacies of it, to be reasonably plain. By reason of sect. 2 of the Act of 1938, a house let as a separate dwelling is not a house to which the Rent Restriction Acts apply unless it is a house which, let as a separate dwelling, is one to which the Acts applied before the passing of the 1938 Act. It appears

- from sect. 1 (2) of the 1933 Act that no house let as a separate dwelling before the passing of the Act of 1938 is a dwelling to which the Rent Restriction Acts apply unless the Acts applied to that house let as a separate dwelling before the passing of the Act of 1933. At the time the
- A 1933 Act was passed, the combined flat No. 69 and No. 70 was not a house let as a separate dwelling. At that time, two separate flats, No. 69 and No. 70, were separately let and separately occupied. The combined flat of No. 69 and No. 70 thrown together only came into existence as a subject-matter of a letting, and as a house to which the
- B Rent Restriction Acts might possibly apply, in 1935. In other words, it was not a house which existed at all as a house to which the Act could apply in 1933. It seems to me, therefore, to follow that the Acts have no application at all to the tenancy which came into being when the combined flats were let to the defendant in the present case in 1935. For
- C those reasons, I agree with SLESSER, L.J., that the appeal must be allowed.

- GODDARD, L.J. : I agree. I doubt myself very much whether we are concerned at all with sect. 2 of the Act of 1938, because I observe that
- D these proceedings were started in the county court in July, 1938, and this section does not seem to have effect till Sept. 29, 1938. Though the action was tried after September, it was begun in July, which is the date at which the rights of the parties have to be determined. However, that really does not matter, because that Act only throws one back on
- E to the Act of 1933.

- It is only necessary, I think, to bear in mind two provisions of that Act. One is sect. 1 (2), which says that the principal Acts do not have any application to houses or premises unless they were controlled before Sept. 29, 1933. Then, turning to the definition section, sect. 16, one
- F finds that "dwelling-house" means a house let as a separate dwelling.

- This is an action to recover possession of premises known as No. 70, Quinn Buildings, Bethnal Green. Those premises now consist of 4 rooms. To my mind, it makes very little difference—in fact, it makes no difference, I think—whether or not they have had, at some time since 1933
- G or 1935, internal connection made between them. They are adjoining premises. In 1935—and, indeed, in 1933, before Sept. 29, 1933—they were not let as a separate dwelling, but they were let as two separate dwellings. They were treated as two distinct hereditaments, let at two distinct rents to two distinct persons. Therefore, I cannot see how it
- H can be said that the premises which are comprised in the demise to Mr. Baldwin, in respect of which this action is brought, were, at the material date to which I have referred, let as a separate dwelling. If they are let as two dwellings, it follows that they are not let as a separate dwelling. It may be that those which have been two are made into one. That is another matter. The person who lives in the flat which previously was two flats, and has been reconstructed into one, does not say that he lives

in two flats, but that he lives in one flat. The fact is that these premises were never let as a separate dwelling until 1935. As they were not let as a separate dwelling in 1933, the Act does not apply.

I think that the county court judge was misled, if I may say so, by cases which have no bearing at all on this case. The principal support of Mr. Jacob for his forceful argument was *Phillips v. Barnett* (1). There are passages in the judgment of SCRUTTON, L.J., in that case which at one time I thought would create some little difficulty, but we are bound by the decision in that case, and, when one looks at the judgment of ATKIN, L.J., and, indeed, at the judgment of BANKES, L.J., having regard to what the court decided there, I feel convinced that the decision we are giving now in no way conflicts with *Phillips v. Barnett* (1), but is in accordance with the judgment in that case.

Appeal allowed with costs.

Solicitors: *Herbert A. Phillips* (for the appellant); *William Sedley & Co.* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

CHISHOLM v. LONDON PASSENGER TRANSPORT BOARD.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.), **December 12, 13, 20, 1938.**]

Street Traffic—Pedestrian crossing—Controlled crossing—Applicability of regulations—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3, 4, 5.

The plaintiff, crossing the street at a road intersection controlled by traffic lights, was injured by an omnibus, which had at the time of the accident crossed the intersection. It was found as a fact that he had stepped on to the crossing some 20 ft. to 30 ft. in front of the omnibus and before the omnibus reached the pedestrian crossing used by the plaintiff. The omnibus, which was travelling at a reasonable speed of 12 m.p.h. to 15 m.p.h., was pulled up in its own length. The Pedestrian Crossing Places (Traffic) Regulations, 1935, reg. 3 requires a vehicle to approach a crossing at such a speed that it can stop before reaching the crossing unless it can be seen that there is no pedestrian thereon. Reg. 5 requires a driver approaching a light-controlled crossing to allow uninterrupted passage to a pedestrian who has started to cross before he receives the signal to go on:—

HELD: (DU PARCQ, L.J., dissenting) the decision in *Bailey v. Geddes* (1) has reference to the case where the pedestrian is already upon the crossing and has no reference to the case of a pedestrian stepping from the footway on to the crossing. In the latter case, the ordinary common law principles of negligence are to be applied, and the driver of the vehicle can plead the contributory negligence of the pedestrian. Upon the facts, there was no negligence on the part of the driver and, even if there was, he was entitled to set up the contributory negligence of the pedestrian, which was a complete answer.

Decision of HILBERY, J., ([1938] 2 All E.R. 579) reversed.

EDITORIAL NOTE. The Court of Appeal have here carefully considered the effect of the decision in *Bailey v. Geddes* (1). The position of a pedestrian stepping

on to a passenger crossing from the pavement is now stated to be governed by the common law principles and, in this respect, the judgments of the Court of Appeal in the above case are construed far more favourably towards drivers of vehicular traffic than it had at one time been thought that they would be. In this the Court of Appeal are in agreement with the view expressed by WROTTESELEY, J., in *Knight v. Sampson* (3).

- A AS TO PEDESTRIAN CROSSINGS, see HALSBURY, Hailsham Edn., Vol. 16, p. 492, para. 724; and FOR CASES, see DIGEST, Supp.; Street and Aerial Traffic, Nos. 31a, 31b.]

Cases referred to :

- B (1) *Bailey v. Geddes*, [1938] 1 K.B. 156; [1937] 3 All E.R. 671; Digest Supp.; 157 L.T. 364.
(2) *Joseph Eva, Ltd. v. Reeves*, [1938] 2 K.B. 393; [1938] 2 All E.R. 115; Digest Supp.; 107 L.J.K.B. 569; 159 L.T. 1.
(3) *Knight v. Sampson*, [1938] 3 All E.R. 309; Digest Supp.; 159 L.T. 257.
(4) *McLean v. Bell* (1932), 147 L.T. 262; Digest Supp.

- C APPEAL by the defendants from the judgment of HILBERY, J., sitting without a jury, given on Apr. 25, 1938, reported [1938] 2 All E.R. 579, where the facts are fully stated.

N. R. Fox-Andrews for the appellants.

H. Glyn-Jones for the respondent.

- D SCOTT, L.J. [read by MACKINNON, L.J.]: The action in this case was brought by the father of a lad of 15 years of age, suing for himself for expenses, and on behalf of his son for damages for personal injuries caused by a collision on the pedestrian crossing at the east end of Fleet Street with an omnibus belonging to the defendant board on Mar. 8, 1937. For convenience, I shall refer to the lad as the plaintiff.
- E HILBERY, J., gave judgment for £48 8s. 3d. for the expenses, and £225 for the personal injuries, on the ground that the driver was, in the circumstances, guilty of negligence, and, I think, on the further ground
- F that, because the plaintiff was actually on the crossing, it was impossible in law for any question of contributory negligence to arise. The case is of general importance in regard to pedestrian crossings, because the judge, in deference to what he thought was decided previously by this court, construed the relevant regulations in a way which would impose
- G on drivers of motor vehicles an impossible burden, not intended by the language used. I do not think that he would have given the regulations that construction if he had considered himself free to act on his own judgment, but apparently he felt constrained to adopt it, because he supposed that the Court of Appeal in *Bailey v. Geddes* (1) had said that
- H he must. If his interpretation were right, the practical results would be disastrous to good management of traffic under the present regulations. Fortunately, however, I think that he has misinterpreted the judgments of the Lords Justices in that case. The present appeal affords a good opportunity of explaining that decision, to which I was myself a party, if any explanation is needed.

The present case has also some local importance, because the system of traffic-control by lights in force at Ludgate Circus is unusual in two respects—namely, construction and functioning—and it is impossible without explanation of both to understand how the relevant regulations should be read and applied to that locality. Some description of the local features is necessary both for this purpose and in order to follow the evidence which the judge had before him. Ludgate Circus is the focus of intersection between the main east-and-west route between the City and Charing Cross, Ludgate Hill running down into it from the east and Fleet Street running out of it to the west. On the south-to-north route, New Bridge Street comes in on the south side of the circus and Farringdon Street goes out on the north side, nearly at right angles to the east-and-west route. There are one or two other roads opening on to the circus but they need not be considered.

The circus is a roughly circular area about 50 yds. in diameter. There are two pedestrian crossings across the east-and-west route, one at the bottom of Ludgate Hill where it debouches into the circus, and the other at the opposite side of the circus, just inside Fleet Street. There is a curved quadrant on the south-west side, between New Bridge Street and Fleet Street, with shops, pavement and kerb, Lyons' shop being in the middle. The eastern side of the Fleet Street crossing is exactly at the corner where the quadrant kerb joins the Fleet Street kerb. There is no four-way traffic-lights post, or group of posts, at the centre of the circus at the point where the east-and-west and north-and-south traffic-streams intersect—probably in order to keep the central space free from obstruction. All four streets carrying the streams are treated as ending at the circumference of the circus. The result is that, for instance, on the east-and-west route, there is no single post, or group of posts, bearing lights constructed so as to show along that route in both directions. The complete post is, as it were, divided into two partial posts. Access into the circus from the east is controlled by lights facing up Ludgate Hill where it debouches into the circus, but there are no lights on the opposite side where the traffic leaves the circus. Thus, the lights at the foot of Ludgate Hill facing east serve the double purpose of controlling entry into the circus and exit from it into Fleet Street. The post on the west side of the circus, situate upon the island at the bottom of Fleet Street, carries no light at all facing east, although it does carry lights facing west up Fleet Street in order to control east-bound traffic. These lights, however, are of course invisible from the east. It also carries right-angle lights facing south to control traffic (including pedestrians) coming from the south and bound either for Farringdon Street, or, left-handed, from Fleet Street.

The second unusual feature of the control is that it is not worked automatically, but by one police officer through electric controls, using his own discretion. On the north side of the circus, jutting out from Farringdon Street into the circus, is an island, and on it is a high, raised

box, electrically equipped. There the police officer sits, and releases and stops alternately the two intersecting streams of traffic. When he thinks right, he lets the east-and-west stream of traffic through, then turns their respective green lights to amber, and the north-and-south stream's red light to red and amber, holds the amber lights both ways

A for 3 seconds and turns on the red to the east-and-west stream and the green to the north-and-south stream. Two effects follow from this system of construction and user. One is that, if a driver coming down Ludgate Hill reaches the stop-line at the bottom with the green light still showing, he receives a double instruction: (i) "You have permission

B to go straight on at a proper speed until you come to the next control, subject only to passenger crossings and the ordinary duties incidental to driving in the streets," and (ii) "It is your duty, until stopped for any such cause, or stopped to pick up or put down passengers, to proceed on your way at such speed without delay." The green light at the bottom

C of Ludgate Hill thus conveys both a permit and an order to go on across the circus and past the blind traffic-post at the foot of Fleet Street (which to west-bound traffic is non-existent), across the pedestrian crossing, unless there is someone on it, and up Fleet Street. An omnibus will thus in practice go straight on, subject as I have said, to the next bus

D stop, which is in fact only about 25 yds. beyond the crossing. The system entails the presence of no other police constable on duty at the circus or the crossings at its edge.

The relevant regulations are as follow. Under the Road Traffic Act, 1934, s. 18, the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, were duly made by the Minister. Regs. 3, 4 and 5 are as

E follow:

3. The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.
4. The driver of every vehicle at or approaching a crossing where traffic is not
- F for the time being controlled by a police constable or by light-signals shall allow free and uninterrupted passage to any foot passenger who is on the carriageway at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossing.
5. The driver of every vehicle at or approaching a crossing at a road intersection where traffic is for the time being controlled by a police constable or by light-signals shall allow free and uninterrupted passage to every foot passenger who has started
- G to go over the crossing before the driver receives a signal that he may proceed over the crossing.

The primary purpose of reg. 5 is to prevent motor traffic, which has been temporarily held up either by the arm of the police constable or by the red or red and amber lights, from rushing forward on the wave of the

H arm, or on the change from red and amber to green, before the pedestrians on the crossing have had time to get into safety. If the crossing is not a controlled crossing, reg. 5 cannot apply. It results from the system in force at Ludgate Circus, which I have described, that the southern half of the pedestrian crossing at the foot of Fleet Street on the west side of the circus is not controlled either by the police or by traffic-lights.

Reg. 5, therefore, has no application, but regs. 3 and 4 both call for consideration.

There is one other regulation which was considered below, reg. 28 of the Traffic Signs (size, colour and type) Provisional Regulations, 1933, made under the Road Traffic Act, 1930, s. 48, entitled "Significance of Signals." Subpara. (iii) states the statutory meaning of the green light thus : A

The green signal shall be taken to indicate that vehicular traffic may pass the signal and proceed straight on or to the left or to the right, with due regard to the safety of other users of the road, and subject to the directions of any police constable or other duly authorised person who may be engaged in the regulation of traffic.

This regulation, and the judgment of this court in *Joseph Eva, Ltd v. Reeves* (2), in my view, warrant the interpretation I have put upon the green light in my description of the local circumstances. B

The facts as found by HILBERY, J., included the following. On Mar. 8, 1937, at about 1.30 p.m., the plaintiff came from New Bridge Street with the intention of crossing the mouth of Fleet Street on his way to the pavement on the north side of that street. He walked along the curved quadrant on the south-west side of the circus in the direction of the pedestrian crossing, and the judge adds, at p. 580 : C

He says that before he left the pavement he took a glance to the right—at any rate, as far as somewhere near the middle of Ludgate Circus, which seems to be all that was required, if he was avoiding traffic coming from the east—and then, looking across the road in the direction in which he wished to go, he observed that the traffic coming down Fleet Street from the west, had come to a standstill at the crossing. D

The judge then considered the evidence in the case, and found as a fact that the plaintiff left the pavement at a point about 1 ft. inside the eastern line of studs of the pedestrian crossing, so that, when he collided with the omnibus, he was on the crossing. He then considered how far away the omnibus was at the time when the plaintiff stepped on to the crossing. He was not able to fix the distance, and had to content himself with a finding that the omnibus was then approaching the crossing. He then considered the effect of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, reg. 3, pointing out that the effect of that regulation had been considered by the Court of Appeal in *Bailey v. Geddes* (1), and said that, in his view, the Court of Appeal had there decided (p. 581) E

... that, once a pedestrian is upon a pedestrian crossing to which that regulation applies, and a vehicle is an approaching vehicle to which the regulation applies, any want of care on the part of the pedestrian which might have prevented him from recovering at common law is irrelevant, because the Court of Appeal has said that the duty put upon that driver by the regulation is such that, had he obeyed it, he must have avoided any negligence there might be on the part of the plaintiff. F

The judge having found that the plaintiff stepped on to the crossing, and that, at the time when he set out from the kerb, the omnibus was an approaching vehicle with the meaning of the regulation, the defendant board was necessarily liable. HILBERY, J., expressed a doubt as to whether the principle which he discerned in the Court of Appeal G

judgment was sound, but said that he was bound by it. He also held that the driver of the omnibus was guilty of negligence in failing to notice when he was still far enough away from the pedestrian crossing to pull up that the east-bound traffic on the opposite side of Fleet Street had come to a standstill at the stop line. I think that this finding is based upon a misconception of the legal position. The driver having been told by the green light when he entered the circus from Ludgate Hill "to go straight on," and the traffic-lights post at the foot of Fleet Street being non-existent for him, he was under no duty at all to concern himself with what the east-bound traffic was doing on the other side of Fleet Street. What the driver said was that he did not notice it, his attention being concentrated upon the people on the pavement (they were in the neighbourhood of the pedestrian crossing), presumably lest any of them should suddenly step on to the crossing. If so, the direction in which he was looking was in accordance with what, it seems to me, was his primary duty. At that time, he had no duty to concern himself with the other stream of traffic.

That ground of negligence being eliminated, his judgment against the defendant board must rest on one of two grounds—either that the Court of Appeal decision compelled him to hold that, if the plaintiff was once actually on the crossing, the omnibus was bound somehow to pull up so as to avoid him, however near it had got to the crossing at the moment the plaintiff stepped on to it, or, alternatively, that, if the Court of Appeal did not compel him so to construe the regulation, the omnibus was still sufficiently far away from the crossing when the plaintiff stepped on to it to give the driver reasonable time to pull up. I will come back to the question of the decision in *Bailey v. Geddes* (1), but I will discuss the question of fact in the above alternative view before doing so. The omnibus was 27 ft. long. The total distance across the circus is little more than 5 lengths of the omnibus, and the driver said that he was going at 12 to 15 m.p.h. At 12 m.p.h., the omnibus would cover its own length in $1\frac{1}{3}$ seconds. The police constable from the control-box said in evidence that the driver was going at a normal speed of from 15 m.p.h. to 20 m.p.h. Either speed would be perfectly proper as he passed the green light, but I think that the driver's own estimate should be preferred, the more so as the lesser speed was, I think, in effect corroborated by a witness, Mr. Jones, to whose evidence I will refer in a moment. The constable in the control-box did not change the east-and-west light (i.e. at the foot of Ludgate Hill for west-bound traffic, and at the foot of Fleet Street for east-bound traffic) from green to amber until the moment when the omnibus was halfway across the circus, which is less than 3 lengths of the omnibus from the pedestrian crossing at the bottom of Fleet Street. Mr. Jones walked across the circus from Ludgate Hill at the same time as the omnibus was crossing it. He said that the omnibus was slowly passing him when he was at the foot of Ludgate Hill, and that, as it was a suitable bus for him to board in order to go to

the Strand, he quickened his pace to catch it at the stopping place a little way up Fleet Street. As he came more or less level with the quadrant on the south-west side of the circus, he

saw a boy come into his line of vision, dash off the pavement and try to beat the bus across the pedestrian crossing. He realised he was too late and tried to jump back and fell.

Asked where the bus had got to at the moment when the plaintiff left the kerb, he answered :

I should say the bus was halfway, taking the kerb again with the road there where it joins—the bus was more or less halfway across that kerb where the road or circus bends.

What did the bus driver do when the boy left the kerb ?—The bus driver swerved towards the obelisk.

Towards his offside ?—Yes, towards his offside, in an endeavour, if the boy stopped, or had jumped clear, to give him as much room as he possibly could.

Did the boy take any precaution before he left the pavement ?—Not as far as I was able to see.

In cross-examination as to where the bus was at the moment he saw the boy step off the pavement, he was, naturally, unable to be very precise, but thought that the bus was “either just slightly past me or just level with me.” In answer to further questions by Mr. Glyn-Jones and the judge, he said in effect that he thought he had himself reached as far west as the “L” of “Ludgate” on the plan, but not so far out (that is, towards the north), “when the bus more or less passed me or was level.”

If this evidence is plotted on the map with the nearside of the stern of the bus on the “L,” the front of the bus would be 12 ft. from the crossing. That the bus had reached as near the crossing as that seems to me to be borne out by the evidence of Hickford, the passenger from the front near seat in the upper compartment of the bus, whose evidence was as follows :

Your bus was going across Ludgate Circus. Now tell my Lord what you saw.—First of all, I noticed the boy for the reason that he was running, or moving faster than the people on the pavement. I did not take a lot of notice at the moment, but I saw him leave the pavement, and he did not look left or right, and I felt the bus swerve, and the brakes were applied.

About how far away from the front of the bus was the boy when he left the pavement ?—I could not really say.

Could you point out any object in this court which would show about how far away he was ?—About from here to the first door—[indicating].

It was very close ?—Yes.

The judge, it is true, thought that evidence inconsistent with Jones' evidence, but I cannot see the inconsistency.

The plaintiff's own evidence was not as clear as it might have been, because at the outset he was asked a question which really prevented him from giving a narrative of his course from New Bridge Street along the quadrant up to the crossing—namely, to say what he was doing in Fleet Street. Starting from that question, he was asked what he did “before crossing the road.” His answer was that he first looked round to his right, so that he could see anything as far as the middle of the circus. However, he was not asked how far on his way to the crossing he had got when he looked to the right, and it may well have been when he was

still some distance away. He next said he looked to the right, noticed that the traffic on the opposite side of the road was stationary, and then proceeded to cross. In cross-examination, he said that there were quite a number of people on the pavement near the crossing, and that he walked at a fast walk.

- A The judge inferred from that evidence that the omnibus was still some little distance off the crossing when the boy stepped on to it. That conclusion, I think, was really based upon the assumption that the boy looked round to his right just as he stepped off the pavement. However, in view of the fact that he was never asked to tell his story from the time
- B he turned from New Bridge Street on to the quadrant, I do not think it possible to rely on any inference as to where exactly he was when he looked round to his right and did not see any omnibus. When one compares his evidence with Jones' evidence that the boy dashed across and tried to beat the bus to the obelisk, and when one remembers that
- C the driver never saw the boy at all, the only possible conclusion of fact seems to me to be that the boy looked round, not at the moment he stepped on to the crossing, but at some point before he got to the crossing. The presence of a lot of people just near the crossing may well have prevented him from noticing the bus at that late stage. The conclusion that the
- D omnibus was very near to him when he stepped off the pavement is borne out by another answer in Jones' evidence: "When the boy left the kerb the bus driver swerved towards the obelisk." Jones was in a perfect position to observe the simultaneity of the boy's act of stepping off the pavement and the swerve of the bus, and on this crucial answer he was
- E not cross-examined. Of Jones, the judge said in his judgment:

- There again it appears to me that I have guidance by a witness who, I thought, was a witness endeavouring to tell me, without any sort of advocacy one way or the other, what his impressions were. He was a witness called by the defendants, Mr. Leonard Percy Jones, and he was crossing from Ludgate Hill across Ludgate Circus, and, as he was crossing, and was about opposite the middle part of the circumference of the circle which Ludgate Circus forms—when he was in about
- F the centre of the left-hand portion or somewhere opposite Lyons' shop—the omnibus passed him, and about the same time he observed the boy stepping on to the crossing.

- I cannot help thinking that in the end the judge took the view of the evidence which I have expressed. At the close of Mr. Fox-Andrews' speech, and before Mr. Glyn-Jones, for the plaintiff, addressed him, he
- G said this:

- I will tell you the point of view I take about the fact, if it will help you, Mr. Glyn-Jones. On the facts, I think that this boy hurried on to the footway close to the studs, but in the footway, as Mr. Hickford told me. He hurried like that without taking any sufficient look-out in regard to oncoming traffic, or traffic which might
- H reasonably be expected to be coming either up Fleet Street or across Ludgate Circus, at a time when the omnibus was approaching that line of studs, and, until I hear you, it appears to me that this is a controlled crossing. That is to say, you cannot really make the south side of the refuge different from the north side, and say that there is a control on the north side but none on the south side. I think that it is a controlled crossing, and, in that case, what would be the result?

Glyn-Jones: The result is that I am within the decision of the Court of Appeal, and reg. 3 requires the driver to comply with the over-powering obligation which is upon him.

I disagree with the judge's view that "the southern side" was a controlled crossing, but, for the moment, I am concerned with facts, not law.

The concluding part of the judge's judgment indicates, I think, even more clearly, that, but for his view of the Court of Appeal's decision, he would have held that the plaintiff was guilty of contributory negligence. He says, at pp. 584, 585 ;

The other question which arises is whether or not, in the particular circumstances, the plaintiff was guilty of contributory negligence. Whether he was or not does not really affect my decision, because I am bound by the Court of Appeal decision that reg. No. 3 applies. I think it fair, however, to state my view of the matter, and I think that it has been apparent to many of us for some time that the introduction of pedestrian crossings and these regulations has given rise to fresh problems where contributory negligence is alleged on the part of pedestrians. If it is right to say that the pedestrian is entitled to expect the driver at all times to obey those regulations, then it seems to me to follow that the pedestrians are not guilty of want of care for their own safety if they step on to a pedestrian crossing on which there is no vehicle, although they do not look to see what vehicles are approaching, because they are entitled, according to the Court of Appeal, to expect that, if a vehicle is approaching when they step on to the crossing, that vehicle will stop. The plaintiff in this case says : "I looked to the right. I did not look further than a certain distance to the right, but there was not, within such distance as I looked, at any rate, any vehicle approaching. The crossing was clear, and the traffic in Fleet Street was stopped. There was nothing on the crossing, and, in those circumstances, I stepped upon the crossing at an appropriate moment upon which to step upon the pedestrian crossing and regard myself as safe." He does not say all that to me, but that is what the plaintiff's case conveys. I do not think he is saying what is untrue when he says that he took a glance to the right. However, what, above all, led him to go into the road—hurrying as he was—was the fact that he had just arrived at the pedestrian crossing in what appeared to be the nick of time, when the traffic stopped, for pedestrians to go across, and he went on to the crossing, in those circumstances, regarding himself as having, as it were, the right of the road. Having regard to the regulation and to the Court of Appeal decision, I am not prepared to hold that there was any contributory negligence on his part. It is not for me to comment upon the peculiarities and the apparent hardships which seem to follow upon that application of that regulation in the light of certain decisions. I must give effect to it. In these circumstances, I do not think that I am justified, having regard to the state of the regulations and the decision to which I have referred, in saying that in this case there was any contributory negligence, or want of reasonable care for his own safety, on the part of the plaintiff.

On the issue of fact, two observations are suggested by this passage. The first is that the judge did not attempt to say where the boy was when he glanced to the right. The second is that, but for what he conceived to be the effect of the Court of Appeal decision, he would have held the plaintiff guilty of contributory negligence in stepping on to the crossing at a time when the omnibus was so near, and would have held that it was impossible for the driver to avoid collision. That conclusion of fact seems to me the only one consistent with the evidence, and I approach the questions of law on that basis.

On the preliminary point of the application of the pedestrian crossing reg. 5, the judge, in my opinion, for the reasons I have already given, took a mistaken view of the Fleet Street crossing. For traffic going west, after passing a green light at the foot of Ludgate Hill, there is no control there at all. Reg. 5 has, therefore, no application. It is only regs. 3 and 4 which are capable of applying to the west-bound half of that crossing. In my opinion, however, neither regulation applies directly to the facts of the present case, and there is nothing said in *Bailey v.*

- Geddes* (1) to bind either the judge or this court to treat those regulations as so applying. Neither the regulations nor the judgments of the Lords Justices in that case attempt to define the duty of a pedestrian in regard to embarking from the footway on to the crossing. His duty at that stage is left to the common law. No penalty is imposed on the pedestrian
- A** for embarrassing approaching vehicles. The only relevance of the regulations is indirect. The pedestrian desiring to leave the footway and traverse the crossing is entitled to assume (i) that approaching traffic is acting, and will continue to act, so as to be able without difficulty to comply with the directions of the regulations, and (ii) that, if an approaching
- B** vehicle is far enough away for it conveniently to check its speed, he is entitled to cross. I say "conveniently," because a pedestrian, even if willing to risk his own life, has no right suddenly to embarrass a driver who is driving at a reasonable speed at which he can stop quickly. Such a right would involve a duty upon every car to slow down to almost a
- C** walking pace at every pedestrian crossing, and this would reduce the flow of traffic in a busy town to an absurdity. If the pedestrian suddenly embarks on an empty crossing so as to embarrass a car which has come quite close, and thereby causes, or contributes to, a collision, he has only himself to blame, and the driver is under no liability to him for the
- D** consequences. On the other hand, drivers must remember that it is not reasonable to keep pedestrians waiting for an indefinitely long stream of traffic to pass by, and, upon a reasonable interval occurring—say 50 yds. to 70 yds.—a waiting pedestrian is, in my view, entitled to step on to the crossing and to cross. If he signals to the driver as he does it, it is
- E** a courteous, and usually a prudent, thing to do, but I cannot say that it is his legal duty, for it is the duty of every car, when approaching a crossing where people are standing on the pavement, to be prepared for their stepping on to the crossing, and, therefore, because of that chance, not to approach at a speed which will make it difficult to pull up if a
- F** pedestrian does step on to the crossing when the car is still a reasonable distance away. Indeed, in the case of any crossing where there is a likelihood of pedestrians wanting to cross, all cars ought to reduce to a moderate speed before they get to a point at which they become "approaching" cars within reg. 3.
- G** If I have seemed to digress too far from the immediate issues in the appeal, my reply is that it is very difficult to grasp the real meaning of what seem to me to be wise and necessary regulations without keeping in mind the reciprocal forbearance and consideration for which they call if accidents are to be avoided and the average flow of traffic helped.
- H** It remains to deal with the decision of this Court in *Bailey v. Geddes* (1). The interpretation put upon it by the judge was never interded by the court. The decision there did not touch the question of the duty of the pedestrian still on the footway not to embarrass traffic approaching the crossing by suddenly stepping on to it when the traffic has already come too close for it to stop easily, even though proceeding at not more than

a reasonable speed. The pedestrians in that case were already on the crossing well before the car had approached anywhere near it, and the decision was limited to that type of case, and did not touch the case of a pedestrian stepping on to an otherwise empty crossing. I said a few words at the end of my judgment, however, for the express purpose of emphasising that limitation upon the scope either of the decision or of anything said in our judgments, although, on re-reading what I said, I see that my words were not so clear as they ought to have been. I had two thoughts in mind. One was a wish to state that nothing we were saying excluded the possible defence of contributory negligence where it was a question of a pedestrian not already on the crossing passing from the pavement on to it. The other was a feeling that the pedestrian regulations cannot be enforced in a way satisfactory to the public unless each side not only does what the law requires, but also acts courteously towards the other. I tried to put both ideas into one sentence, and did not quite succeed. The decision in *Bailey v. Geddes* (1) and the judgments still seem to me to be right. They do not, however, touch the present appeal.

In this case, the plaintiff was, in my opinion, guilty of negligence, and his negligence was the sole cause of the accident. The driver was not guilty of any negligence, but, if he had been, the plaintiff's negligence would have been contributory. In either case, the defendant board is entitled to judgment, and the appeal should be allowed, with costs here and below.

MACKINNON, L.J.: The defendants' servant was driving one of their heavy omnibuses, 27 ft. in length, along a London street. The roadway ahead of him was clear. He had passed a traffic-signal light which was green. He was on his proper side of the road. He was going at a reasonable pace, 12 m.p.h. to 15 m.p.h. Suddenly, the plaintiff left the footpath some 20 ft. to 30 ft. in front of the omnibus, and began to walk quickly across the track of the omnibus. Its driver swerved to the right to try to avoid him, and put on his brakes. He stopped the bus dead in its own length, but the plaintiff was struck and injured. If, upon that statement of facts, without more, the plaintiff had the hardihood to sue the defendants for damages, only one result would appear possible. Even if it were possible to say that there was any negligence on the part of the driver of the bus, there can be no doubt that the plaintiff must be held to have been negligent, and, by his negligence in walking suddenly out in the way of the bus, to have been the real cause of his own misfortune. However, there was one additional fact which I did not mention—namely, that the spot in the roadway on to which the plaintiff hurried is within the two lines of metal studs which are the recognised boundary-marks of a pedestrian crossing. When that fact has been added to the others which I mentioned, HILBERY, J., has held that, by virtue of the Pedestrian Crossing Places (Traffic) Pro-

visional Regulations, 1935, reg. 3, as interpreted by this court in *Bailey v. Geddes* (1), he was bound to decide in favour of the plaintiff, and to make the defendants liable to pay him damages. I am clear that the decision in *Bailey v. Geddes* (1) imposed no such compulsion on the judge. The mandatory words of reg. 3 are enacted subject to a condition :

A . . . unless he [the driver] can see that there is no foot passenger thereon [on the foot passenger's crossing].

In *Bailey v. Geddes* (1), it was obvious that the driver of the car could not rely upon this condition. The man he knocked down had come from the opposite side of the road, which was 52 ft. wide, and, when he was

B knocked down, was close to the further side of the road he had nearly crossed. He must have been walking for almost 50 ft. upon the crossing, and must have started on it when the car was some way down the road. The driver of the car could not see him by reason of other traffic that blocked his view, but the driver could not say that he could see that

C there was no passenger on the crossing. All he could say was that there was a passenger on the crossing, but that he could not see him. In short, as SLESSER, L.J., said, at p. 164 ([1937] 3 All E.R., at p. 674) :

In this case it is obvious on the evidence that he was unable to see that there was no foot passenger thereon.

D This case is radically different. In this case, the driver of the bus, when approaching the crossing, could, and did, see that there was no foot passenger thereon, and, so long as he could see that, the regulation imposed no duty upon him. It is true that, when he got some 20 ft. or 30 ft. from the crossing, he could see a foot passenger on it, when the

E plaintiff appeared, and, in one literal sense, he was then "approaching" the crossing. HILBERY, J., seems to have held that *Bailey v. Geddes* (1) (on the facts of which, as I have pointed out, no such question arose) impliedly decided that, if a pedestrian gets on to the crossing at any moment before the vehicle reaches its boundary, the obligation of the

F regulation is instantaneously imposed. This would mean that, in any street with a crowded pavement, a driver approaching any crossing, to be safe from possible liability, must slow down more and more, so that, if, when he is 1 ft. from the crossing, some fool steps into the road ahead of him, he can pull up his car in less than 1 ft. This is perhaps a possible

G meaning of a passage in the judgment of SLESSER, L.J., at p. 166, but I cannot believe that he meant that, and, as I have pointed out, any such decision was quite unnecessary upon the facts of that case. Such a view seems to me an absurd and perverted application of *Bailey v. Geddes* (1), and that it is so seems to have been rightly held by

H WROTTESELEY, J., in *Knight v. Sampson* (3).

In that case, the car had got within a foot or two of the crossing when the pedestrian was seen to get into the road. The car, literally, was "approaching" the crossing, but WROTTESELEY, J., held that the regulation did not apply. Obviously, he was right, unless this regulation is to be construed as imposing a ridiculous absurdity. In the present

case, the bus had got about its own length—27 ft.—from the crossing when the pedestrian got off the pavement. Again, it was, literally, “approaching” the crossing. Does the regulation apply, so that the driver must be in fault because he had not slowed down to 5 m.p.h. or perhaps 1 m.p.h.?

The primary duty of a driver is to proceed at a reasonable speed. A Let that be x m.p.h. Suppose that at x m.p.h. he can pull up in y ft. If he is going along at x m.p.h., and sees a pedestrian on a crossing ahead, he must, of course, slacken speed. If, however, he sees no pedestrian on the crossing he is approaching, I think that he can continue at x m.p.h. B If, when he has got less than y ft., from the crossing, a pedestrian enters it, he must, of course, do his best to pull up. However, as, *ex hypothesi*, he can only do so in y ft., he may be unable to avoid hitting him. In that case, I do not think that he should be held to have broken the regulation. So to hold must mean that, going along the road at the proper speed of x m.p.h., every time he comes near to a crossing, he must slow down almost to a walking pace because of the possibility that some pedestrian may step into the road a few feet ahead of him. Moreover, this view of the regulation, besides being the commonsense one, seems to me to recognise that there must also be a correlative duty of elementary care on the part of the pedestrian. Reg. 3 cannot have been intended to give to pedestrians a licence to be utterly reckless. If the vehicle is coming along at the reasonable rate of x m.p.h., at which it can be stopped in y ft., for a pedestrian to walk in front of it when it is less than y ft. from him, and when he can plainly see it, is the acme of recklessness. In the present case, the bus-driver, in my view, was clearly going at the reasonable pace of x m.p.h., and the pedestrian did walk into the road when the bus was less than y ft. from him. The pedestrian, if he had looked, could obviously have seen the bus. C D E

On the facts, I am doubtful if there was any negligence on the part of the bus-driver. However, even assuming that there was, I am quite F clear that there was contributory negligence on the part of the plaintiff. I think that HILBERY, J., was also of that opinion, but he thought—erroneously, as I hold—that he was bound by *Bailey v. Geddes* (1) to decide, as a matter of law, that the plaintiff could not be guilty of contributory negligence. I say that he was of that opinion, for, in concluding his consideration of the question whether there was contributory G negligence on the part of the plaintiff, he says, at p. 585 :

Having regard to the regulation and to the Court of Appeal decision, I am not prepared to hold that there was any contributory negligence on his part.

The spot where this accident happened is very familiar to me, and, H during an adjournment of this case, I went to it again. For the boy to leave the kerb where he did, without looking to the right, when he saw, as he must have done, the vast advancing bulk of the omnibus within a distance that cannot have been more than about 30 ft., and may have been less, seems to be as negligent as anything could possibly be.

We had a good deal of discussion as to other matters in regard to these particular cross-roads, at which the system of traffic-lights appears to be unusual, if not unique. I think that those other matters are immaterial and, therefore, I have not dealt with them. In the result, I think that this appeal should be allowed and judgment entered for the defendants in this court and below.

DU PARCQ, L.J. : As I have the misfortune to differ from the other members of the court, it is desirable that I should set out briefly the facts of the case, as I understand them. In so doing, I accept the findings of the judge, which, in my opinion, are amply supported by the evidence.

On Mar. 8, 1937, about the middle of the day, the infant plaintiff, an office-boy of 15 years of age, was knocked down by one of the defendant board's omnibuses when he was on the pedestrian crossing at the Ludgate Circus end of Fleet Street. The omnibus was coming from the direction of St. Paul's. In the centre of Ludgate Circus and on its northern side, there is a traffic-control box from which a policeman controls certain traffic-lights. There is a set of these lights where Ludgate Hill meets the circus, and another at the circus end of Fleet Street. There are also lights regulating the traffic from Farringdon Street and New Bridge Street. A driver, coming from the east, receives a signal from the lights placed where Ludgate Hill joins Ludgate Circus (at which point there is a pedestrian crossing), but he cannot see, because they face in the direction of traffic coming east (and, therefore, away from him), the lights at the Fleet Street end of the circus, where is situate that pedestrian crossing upon which the plaintiff was struck and injured.

When the defendants' omnibus came to the first, or Ludgate Hill, pedestrian crossing, the light at that crossing showed green. When, the bus, continuing its course, got to about the centre of the circus—that is about 75 ft. from the Fleet Street crossing—the policeman changed to amber the lights at the Ludgate Hill and Fleet Street crossings, with the result that the further flow of traffic from St. Paul's was suspended and traffic coming from the west towards the defendants' omnibus stopped at the Fleet Street crossing. The defendants' driver could not see the change of lights, and did not observe that the east-bound traffic had stopped. He was still entitled to proceed over the Fleet Street crossing, but he would know that there was a possibility, if not a probability, that, on the change of lights, foot passengers would begin to cross it.

According to the policeman's evidence, no west-bound traffic got past the Ludgate Hill lights after the defendants' omnibus. The judge thought that the driver ought, in the circumstances, to have noticed that the east-bound traffic had stopped. The driver said, however, that he "was not interested in the traffic in Fleet Street," but "more interested in the people on the pavement," and this may well be regarded as a proper statement of his duty if he meant that he was alive to the

possibility of someone stepping off a crowded pavement. Unfortunately, however, he did not notice the plaintiff, who, as soon as he saw that the east-bound traffic had come to a standstill, which would be very soon after the amber light came on at the Fleet Street crossing, left the pavement and began to hurry across the crossing from south to north. It is not very clear how far across the road the plaintiff got, but the evidence, **A** in my opinion, justified the judge in finding, as he did, at p. 584 :

There was apparently an ample space between him [the plaintiff] and his nearside kerb, over which the plaintiff passed, for the driver to have seen him, even though the plaintiff was hurrying.

Nor is it clear what distance the omnibus was from the crossing when the plaintiff began to cross. **B**

A witness whose evidence the judge accepted said that the plaintiff stepped on to the crossing when the omnibus was somewhere opposite Lyons' tea-shop. This is an approximate estimate at best, and is also, unfortunately, ambiguous. It may mean anything from 10 ft. to 30 ft. from the crossing. This much, is certain, however, on the judge's findings—namely, that the driver did not see the plaintiff at all until the bus hit him, and, furthermore, that the bus did not stop until half its length (its length being 27 ft.) had gone over the westernmost studs of the crossing. The driver says that he was going at about 12 m.p.h., and could have stopped in 15 ft. "near enough." The policeman's estimate of the driver's speed is 15 m.p.h. to 20 m.p.h. Whatever the driver's speed was, he did not reduce it before he hit the plaintiff, who jumped backwards at the last moment in an effort to avoid the bus. To complete the story, it is necessary to add that the plaintiff, before he crossed, took a glance to the right without noticing the bus. It was, perhaps, a perfunctory glance, because, as the judge has said, at p. 585 : **C**
 . . . he went on to the crossing in those circumstances, regarding himself as having, as it were, the right of the road. **D**

Still, the fact that he did glance to the right without noticing the bus tends to show that it was not less than 30 ft. from him. **E**

On the facts as I have stated them, without considering the effect of the relevant statutory regulations, I should have thought that there was certainly material on which a judge could find that there was negligence on the part of the defendants' driver, who, though he knew, or ought to have known, that pedestrians were likely to come upon the crossing, kept so poor a look-out that the plaintiff got on to the crossing without his seeing him at all, and, consequently, without his making any effort to avoid him until his bus had already struck the plaintiff. It is contended that there was contributory negligence on the part of the plaintiff, and any view as to this must, of necessity, be coloured by whatever opinion is formed as to the effect of the statutory regulations with which I must deal later. **F**

Assuming, for the moment, that there was such contributory negligence (though, for reasons which will presently appear, I do not think that there was), and that the defence of contributory negligence is open to **G** **H**

the defendants, it may well be that the plaintiff was still entitled to succeed on the ground that the defendants' driver would have avoided him by the exercise of reasonable skill and care: *McLean v. Bell* (4), per LORD WRIGHT, at p. 263. I do not find it necessary, however, further to consider this aspect of the case.

A I proceed to deal with the arguments which were put before us as to the statutory regulations and the effect of the decision of this court in *Bailey v. Geddes* (1). So far as the defendants' driver was concerned, the Fleet Street crossing was not a "controlled" crossing, and we are agreed that reg. 5 has no application to this case. The relevant regulations are

B in this case, as in *Bailey v. Geddes* (1), regs. 3 and 4. Whatever may be in doubt, it is certain that this court is bound by a decision of its own, and bound also to give full effect to regulations which have the force of a statute. In considering *Bailey v. Geddes* (1), it is, I think, instructive to notice the conclusion at which the judge who tried it had arrived upon
C its facts. He said that :

if a man chooses to pass in front of a tram-car and can see when he gets across the front that there is a vehicle not more than 5 yds. away from him, his obvious duty is to stop. There was a clear 9 ft. in which the plaintiff could have stood with perfect safety. He, however, did not choose to stand still. He chose to go on and take the risk whether the driver of the motor car would be able to pull up. If people do that, they are, in my opinion, as much to blame as the motorist who
D runs them down.

It may be added that the plaintiff in *Bailey v. Geddes* (1) admitted in cross-examination that "he did not see the defendant's motor-car, although he had a clear view." One may well think that, but for the fact that he was on a pedestrian crossing, and but for the regulations

E there would have been a clear case of contributory negligence. The only, though sufficient, answer of the plaintiff's counsel is that : "It is not negligence for a pedestrian to assume that the regulations will be obeyed by the driver of a motor car." This court held, not only that the judge was wrong in finding contributory negligence, but also that,
F in the circumstances, it was impossible, as a matter of law, that this plea should succeed. GREER, L.J., said, at p. 161 ([1937] 3 All E.R. at p. 672) :

... though it might have been held to be negligent, if they [the plaintiff and a companion] had not been at a Belisha crossing, to start crossing at a time when they could not see by reason of the other vehicles whether there was any car
G approaching the crossing, they on this occasion were under no such liability, because they were protected by the regulations which had been passed, and they were entitled to suppose that vehicles approaching the crossing would strictly obey the regulations which were passed for the benefit of foot passengers.

Later, he said, at p. 163 ([1937] 3 All E.R. at p. 673) :

H In my opinion, there was no evidence on which he [the trial judge] could hold that there was any negligence on the part of those crossing the road at the Belisha crossing.

In the same case, SLESSER, L.J., at p. 166 ([1937] 3 All E.R. at p. 675) went so far as to say, in the most general terms, that the language of the regulations

when a breach of them has been committed, makes it impossible for the driver of the offending vehicle to rely on contributory negligence.

After emphasising the importance of a recognition by motorists of "the overpowering obligation" imposed by the regulations, SCOTT, L.J., said, at p. 167 ([1937] 3 All E.R. at p. 676):

I entirely agree with what SLESSER, L.J., has just said, that the idea of a plea of contributory negligence is fundamentally inconsistent with the very basis of the regulations, and that is the ground upon which this appeal must necessarily be allowed.

After carefully considering the decision in *Bailey v. Geddes* (1), and the reasoning by which it was supported, I do not feel free, any more than HILBERY, J., did, to treat it as having no application to this case. If the defendants' driver was guilty of a breach of the regulations, then it seems to me plain that *Bailey v. Geddes* (1) is directly in point. I do not overlook the fact that in the present case the foot passenger had not taken many steps into the road, whereas in *Bailey v. Geddes* (1) he had nearly reached the opposite kerb. This fact may be of importance when one is considering whether there has been a breach by the motorist of his statutory obligation, but it is not relevant, in my view, to the question whether the motorist can set up a plea of contributory negligence if once it be found that he has broken the statutory regulations. The principle of the decision is that, when it is established that a driver would, or could, have stopped short of the crossing if he had observed the regulations, a foot passenger who is struck when on the crossing can never be said to be guilty of contributory negligence. No doubt, the construction of the regulations gives rise to some difficulty. I think, however, that, if they are reasonably interpreted, no undue inconvenience to anybody will result. The words "approaching a crossing" in reg. 3 refer, in my view, not to a point 100 yds. or 50 yds. from the crossing, but to the space which begins, say, 15 ft. or 20 ft. from the crossing. It is when a driver enters on that final piece of roadway that, unless he can then see that there is no foot passenger on the crossing, he must be prepared to proceed at a speed which will enable him to stop before reaching the crossing. At that time, of all times, it behoves him to be vigilant. This no doubt means that he must put some check on his speed before he gets to the stage of "approaching the crossing," and such a limitation may be accounted a hardship by some. Some uncontrolled crossings may be so situated that critics of the responsible authority may have ground for complaint. Nevertheless any construction of reg. 3 which was more generous to the motorist, even if the words of the regulation could bear it—as, in my view, they cannot—would encourage him to ignore reg. 4, which contains the important words "at or approaching a crossing," and gives precedence at the crossing, not to the motorist, but to the foot passenger.

It is, I think, a reasonable view that, if a motorist, keeping a good look-out, and going at such a speed that he can pull up in a few feet, sees a foot passenger come upon the crossing so late that it is impossible for the car to stop before reaching the crossing, the motorist will not be guilty of a breach of the regulations. It might fairly be said on his behalf

that he "could see that there was no foot passenger on the crossing" down to the last moment when he could reasonably expect a foot passenger to be there, and that he did all that in him lay to "allow free and uninterrupted passage to any foot passenger who was on the carriageway at such crossing." *Lex non cogit ad impossibilia*. In such cases, as a

- A matter of practice, accidents are frequently avoided by the timely sounding of the motorist's horn, or by careful steering. No doubt, however, there will occasionally be accidents like that which led to the decision in *Knight v. Sampson* (3), and such cases will be met by the interpretation which I have suggested. It may, indeed, be observed that
- B WROTTESELEY, J., might have disposed of that particular case by saying that, as it was not proved to his satisfaction that the car had not already reached the crossing when the plaintiff came upon it, the regulations had no application.

- In the case before us, I can see no reason for any reluctance to give
- C effect to the language of the regulations, and, on any possible view of their meaning, I think that the result will be the same. In order that the bus-driver should avoid this accident by stopping before he got to the crossing, it was not necessary that he should cross Ludgate Circus at an absurdly slow speed. Unless I have misunderstood the judgment,
- D the evidence satisfied the judge, who had the great advantage of seeing and hearing the witnesses, that the driver was not keeping a proper look-out. The reason why he did not see the plaintiff on the crossing, and so made no effort to stop before he reached it, was that he was not looking. If he had been keeping a proper look-out, then, assuming him
- E to have been travelling at such a speed as would have permitted him to stop in a few feet, I see no reason to think, again accepting the judge's findings, that he would have had any difficulty in stopping before he hit the plaintiff. There is, I think, no doubt that he was guilty of a breach of the regulations, and, on the authority of *Bailey v. Geddes* (1), I am of
- F opinion that the defence of contributory negligence cannot avail the defendants. The driver in *Bailey v. Geddes* (1) did not see the plaintiff because his view was obstructed. In the present case, the driver did not see the plaintiff because he was not looking. In neither case did the injured plaintiff notice the approaching vehicle. I see no fundamental
- G distinction between the cases.

- If I am wrong in my understanding of this court's decision, and the defence of contributory negligence is open to the defendants, then, in my view, they have failed to establish it. The burden of proving contributory negligence was upon the defendants, and, in considering whether
- H they have established that defence, it is impossible to leave out of account the fact that the plaintiff was crossing the road on an "uncontrolled" crossing. In the circumstances, it was for the defendants to prove, in my opinion, that, when the plaintiff stepped on to the crossing, the bus was so close that he ought to have seen that it was unsafe to do so, even though he assumed, as he would be entitled to assume, that any approach-

ing driver would be keeping a good look-out, and would be prepared for the possibility of foot passengers entering upon the crossing. In my opinion, they failed to establish this.

I think that the judge was disposed to accept what he treated as being in substance the plaintiff's case. The judge summarised it in these words :

I looked to the right. I did not look further than a certain distance to the right, but there was not, within such distance as I looked, at any rate, any vehicle approaching. The crossing was clear, and the traffic in Fleet Street was stopped. There was nothing on the crossing, and, in those circumstances, I stepped upon the crossing at an appropriate moment upon which to step upon the pedestrian crossing and regard myself as safe.

Certainly, the judge did not find that this view of the case was negatived by the evidence, or that the bus had no reasonable opportunity of stopping in time. It follows, in my opinion, that the defence of contributory negligence was not made out.

For these reasons, I think that the judge was right in the conclusion at which he arrived. In my opinion, he has correctly applied the decision of this court in *Bailey v. Geddes* (1). Even without the guidance of that decision, I think that the proper conclusion from his findings of fact would have been that the plaintiff should have judgment, and this I understand to have been the judge's own view, because, when an application for a stay of execution was made to him, he said : " My decision does not turn on any point of law." In my opinion, this appeal should be dismissed. If the length of this judgment requires an excuse, it is, I hope, to be found in the great importance of the question before us. Acceptance of the argument addressed to us by the defendants' counsel, which to-day is meeting with a fate better than that with which it met when it was addressed to this court on behalf of the respondents in *Bailey v. Geddes* (1), will mean, as it seems to me, that, for the future, a foot passenger will have no reason to think himself any safer on an " uncontrolled " crossing than on any other part of the highway. If a motorist is going so fast that he cannot stop till he is over the crossing, or is so unobservant that he does not notice beacons or foot passengers, then the foot passenger (who is not always young, active and clear-sighted), or his personal representatives, may learn too late that no reliance can be placed on the illusory protection of those devices which the legislature has sanctioned. What was meant to be a safety zone may become a dangerous trap.

Appeal allowed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors : *Solicitor to the London Passenger Transport Board* (for the appellants) ; *Gardiner & Co.* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

R. v. ANDREWS.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **December 12, 1938.**]

Criminal Law—Habitual criminal—Prisoner not informed that he might call witnesses—Prisoner not represented by counsel—Legal aid for prisoner.

- A The appellant was charged, in addition to a charge of a substantive crime, with being a habitual criminal. Upon appeal it was objected that the prisoner had not been asked whether he desired to call any witnesses, which in fact he desired to do, and that he had not been given the opportunity of being represented by counsel:—
- B HELD: (i) it is extremely desirable that care should be taken to inform a prisoner that he may call a witness or witnesses, and also that, where there is a charge of being a habitual criminal, he should have the advantage of being represented by counsel.
(ii) in these circumstances the sentence of preventive detention could not stand.
- C **[EDITORIAL NOTE.** In this case the Court of Criminal Appeal have expressed the view that it is very desirable that an alleged habitual criminal shall have legal aid.
AS TO LEGAL AID, see HALSBURY, Hailsham Edn., Vol. 9, p. 148, para. 202; and FOR CASES, see DIGEST, Vol. 14, pp. 247, 248, Nos. 2398-2413.]
- D **APPEAL** against a sentence of 5 years' preventive detention on the ground that the appellant was a habitual criminal.
Gerald Howard for the Crown.
The appellant was not represented by counsel.
- E LORD HEWART, L.C.J. [delivering the judgment of the court]: This appellant, Horace George Andrews, was charged at the Central Criminal Court upon an indictment which charged him, in the first count with breaking and entering a dwelling-house and stealing, and, in the second count, with receiving. There was also an averment that he was a habitual criminal. He pleaded guilty to the second count—that is to say, the count for receiving—and thereupon he was charged with being a habitual criminal, and was found to be a habitual criminal. Afterwards, he was sentenced to 3 years' penal servitude for the substantive offence, and was ordered 5 years' preventive detention on the charge of being a habitual criminal. He is now appealing against his sentence of preventive detention. To deal first, and very briefly, with the substantive offence. It was shown that on Sept. 8 the appellant went to a house to see if he could get work there. He did not know the occupier, but alleged that he thought it possible to get a job there as a val t. He went down to the basement.
- H The door was ajar, and he walked in. Finding that he was alone in the house, he walked round the house. From a bedroom he took a suitcase, and from other bedrooms he took some suits, shirts, and underclothing, a powder-box, and a brooch. He then left the house, and was stopped by the police and was arrested. According to the housekeeper, the door was locked. So much for the substantive offence.

With regard to the charge that he was at the material time a habitual criminal, the case was proved up to a certain point. It was proved, for example, that the appellant had been sent to prison on 20 previous occasions, and had received various terms of penal servitude, the last being in March, 1934, when he was sentenced to 3 years' penal servitude for housebreaking. In November, 1921, he was sentenced to 5 years' penal servitude and to 5 years' preventive detention for larceny and for being a habitual criminal. At the time he committed the substantive offence—that is to say, the offence of receiving—he was a convict on licence, being released from prison on Sept. 2, and the substantive offence was committed on Sept. 8, six days after his release. It appears, however, that, since his release from prison—namely, on Sept. 2—he made an application to an hotel for work. He gave evidence on his own behalf, and unfortunately, by some inadvertence, one must presume, the commissioner omitted to ask the prisoner if he desired to call any witnesses, and we are told that he did desire to call a witness. Whether, according to that evidence, it would have had the effect of preventing the jury from arriving at the conclusion at which they did arrive it is difficult to say, but we do think that it is extremely desirable, not only that the utmost care should be taken to inform a prisoner that he might call a witness, but also that, where there is a charge of being a habitual criminal, unless the circumstances are very unusual, the prisoner should have the advantage of being represented by counsel. In this case, not only did the appellant not have counsel, but also there was the omission, if he chose, to call witnesses. In these circumstances, it seems to us that this sentence of preventive detention should not stand, and it is accordingly quashed.

Appeal allowed and conviction quashed.

Solicitor : *Solicitor for the Metropolitan Police* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re BARNES.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **December 15, 1938.**]

The Court of Appeal, without calling upon counsel for the Crown, dismissed, with costs, the appeal of the petitioner from the decision of LAWRENCE, J., given June 22, 1938, and reported [1938] 3 All E.R. 327. SIR WILFRID GREENE, M.R., stated that the case was a perfectly clear one, and that the reasons for the decision of LAWRENCE, J., were stated so lucidly that it was unnecessary to say anything further.



